

65624-4

65624-4

NO. 65624-4-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

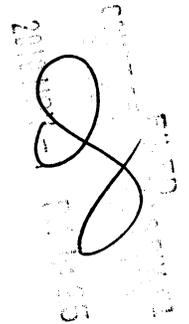
CHARLES ROBERT GARNER, Appellant,

v.

CITY OF FEDERAL WAY, Respondent.

APPELLANT BRIEF

CHARLES R. GARNER
Appellant, Pro Se
29811 Marine View Dr. SW
Federal Way, WA. 98023
(253) 941 2511



A handwritten signature in black ink, appearing to read 'Charles R. Garner', is written over a faint, vertically oriented stamp. The stamp contains the words 'APPELLANT' and 'PRO SE'.

TABLE OF CONTENTS

TABLE OF CONTENTS

COVER	Page 1
Cases	Pages 3-5
INTRODUCTION	Pages 5-30
ASSIGNMENT OF ERROR	Pages 30-34
STATEMENT OF THE CASE	Pages 34-35
ARGUMENT	Pages 35-48
CONCLUSION	Pages 48-50

CASE LAW

Calder v. Bull, 3 Dall.
386, 1 U.S. L.Ed. 648; 6 R.C.L. 276.”40

Carpenter v. Butler,
32 Wn.2d 371, 201 P.2d 704 (1949)40

E.g., Raines v. Byrd,
521 U.S. 811, 818-19, 117 S.Ct. 2312, 138 L.Ed.2d 849
(1997)45

In re Cascade Fixture Co.,
8 Wn.2d 263, 111 P.2d 991 (1941) S.Ct. 577 (1994).43

Johannessen v. United States,
225 U.S. 227, 56 L.Ed. 1066,325 S.Ct 613 (1912)39

Lutz v. Longview
(1974) 83 Wash.2d 566,520 P.2d 137438

Nelson v. Dept. of Labor & Industries,
9 Wn.2d 621,115,P.2d 1014 (1941)43

Rafferty, In re (1890)
1 Wash. 382, 25 P. 46542

Reid v. Pierce County, 136 Wn.2d 195,201,961 P.2d 333 (1998)35
Ridley M. Whitaker v. American Telecasting Inc. 261 F.3d 196 (2ndCir.2001)36
State ex rel. Bowen v. Kruegel (1965) 67 Wash.2d 673, 40936
State ex rel. Bowen v. Superior 139 Wash.454, 247 Pac.942 (1926)36
State v. Inglis (1982) 32 Wash.App 700, 649 P.2d 163;38
State v. Lopeman, 143 Wash. 99,254 Pac. 454 (1927)40

STATUTE:

Pursuant to: RAP Rule 10.3 (a)(3) Citations to the Introduction
is omitted.

RCW 19.2745,49
-----------	------------

RCW 19.27.180	38,39,49
RCW 1.12.010	37
RCW 1.04.010	38
RCW 35.22	36
Federal Way Ordinance 90-43	40
Federal Way Ordinance 89-14	40,41
FWRC 1.05.070	42,43
FWRC 1.05.080	43
Code 13.10.010	44

INTRODUCTION

RPC 3.3 CANDOR TOWARD THE TRIBUNAL

“A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material

fact or law previously made to the tribunal by the lawyer...”. All lawyers know that a Summary Judgment motion must be based upon the version of events most favorable to the non- moving party. Does it not follow that when the moving party’s counsel argues any other version as grounds for Summary Judgment; he has failed his duty of candor with the tribunal, in effect luring the Trial Court into a reversible error? That is what happened in this case.

The issues before this Court are Constitutional by nature and claim; however the issues have been shrouded by Administrative actions.

In the year 1950 the Revised Code of Washington, herein after (RCW) was established. In 1974 the Washington State Building Council was authorized and in 1975 was effectuated. The State Building Code is required to be adopted by Counties and Cities in Washington. In 1989 the Legislature included in RCW 19.27 State Building Code, the section enumerated as RCW 19.27.180- Residential buildings moved into a city or county – Applicability of building codes and electrical installation

requirements. On 28 February 1990, the City of Federal Way, herein after (City), incorporated under the authority of the RCW, adopted parts of the King County Building Code of 1988 which was then heavily modified to become the Federal Way Municipal Code, herein after (FWMC). The modifications of note in these proceedings are: 1) City Ordinance 90-33; 1988 Edition of Codes-Building/Houses/signs/dangerous buildings/pools/barrier free & energy; (02-13-90) 2) City Ordinance 90-34 Moving of Buildings; (02/28/90)

It can be seen from the forgoing that the City effectively by-passed the RCW 19.27 State Building Code as it applies to RCW 19.27.180 in 1989 by going from a 1988 King County Building Code to a 1990 FWMC. Coupled with the high costs associated with City Ordinance 90-34 Moving of Buildings (02/28/90), the Legislative intent to provide for low cost housing by requiring implementation of RCW 19.27.180 upon City Incorporation was negated and set aside.

The new Federal Way Revised Code, herein after (FWRC) is consistent with the prior Federal Way City Code, (herein after

FWCC) and the prior FWMC when it states at FWRC 1.05.070 Code does not affect prior offenses, rights, etc. “Nothing in this Code or the ordinances adopting this code shall affect any offense or act committed or done, or any penalty or forfeiture incurred, *or any contract or right established or accruing before the effective date of this Code.*” (Code 2001 §1-7)

Shortly after the City incorporated on 28 Feb. 1990, the appellant was issued a Notice of Violation-Order to Correct Citation on an R-3 Home built, by best guess, in the 1940's, relocated from near Sea-Tac Airport to 31616 6th Avenue SW, unincorporated King County in 1976. Said relocation was accomplished on a permit issued and bonded by King County. The City Order to Correct required obtaining a permit to bring the building to the then existing FWMC or demolish the building. Those conditions were not consistent with the RCW 19.27.180 and the administrative action was appealed. The Hearing Examiner concluded that the City Code Enforcement Officer and appellant should “just work it out”. Where upon the City prepared a Voluntary Correction Notice requiring appellant to comply with

their initial order. The promulgated FWMC enjoined Appellant from any activities at the site as the City had incorporated Ordinance 90-34 into the FWMC at Chapter 5, Buildings and Building Regulations, Article 1. In General, 5-4 Application and scope. The Provisions of this chapter shall apply to all new construction, relocated building, and to any alterations, repairs or reconstruction except as provided for otherwise in this chapter. (Emphasis added)

Having determined that relocated buildings were relevant to Chapter 5 of the FWMC it should be noted at Chapter 5, Article IX, Section 22, at 22-11 Violations of the chapter:

(a) Violations. It is unlawful for any person to do or cause any of the following to be done and for a property owner to permit any of the following to be done on his or her property contrary to or in violation of this chapter.

- (1) Construct, in any way alter, or move any improvement.
- (2) Engage in any activity.
- (3) Use or occupy any structure or land.
- (4) Conduct any use.

(5) Create any condition.

There has not been any resolution to the above Notice of Violation – Order to Correct to this date, some twenty years later.

In 2003, the City issued another Notice of Violation – Order to Correct Citation on the same property stating the same cause of Violation and the same Order to correct. The citation was appealed, but the appeal process was denied due to conflicting interpretation of appeal time constraints.

A “due process” claim was then filed as NO. 06-2-26104-6 KNT IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING with the CAUSES OF ACTION: Denial of Due Process and Violation of §1983. It was moved to Federal District Court, The Honorable John C. Coughenour, presiding, by the City. On Motion For Summary Judgment by the City, it was granted.

The “due process” claim adjudication was appealed to the Ninth Circuit Court by appellant but failed due to failure in transmission by computer of the entire document before the cutoff

time. The Appellant's Response to Brief of Appellees, not fully transmitted was dated 6 May, 2008.

The City, under the authority authorized by RCW 35.80, on 15 November 2007, adopted Ordinance No. 07-566 amending (amending) Chapter 1, Article 111, of the Federal Way City Code to implement the Process and to acquire the powers authorized by Chapter 35.80 RCW to address ".....conditions which render dwellings, buildings, structures, and other premises unfit for human habitation and other uses." (Emphasis added)

On July 1st, 2008, Mr. Bailey, Building Official for the City, issued a Complaint of Unfit Building to Appellant Charles R. Garner. Contained on that document and expressed as a reason that the building had been declared Unfit were the elements so defined by RCW 19.27.031 State building code- Adoption-Conflicts-Opinions. Those elements, expressed, were so defined as to be incorporated into the State Building Code and shall be effective in counties and cities.

Location within Local Code appears to be irrelevant if approved. This date approximates the eighteen years that the

City, by administrative code, enjoined appellant from those Constitutional rights and conditions which led to the degradation of the building.

At this juncture in time, it should be noted that the City still did not recognize the Legislative intent of RCW 19.27.180 and it did not appear in the FWCC until the Code was codified into the later FWRC where it appears only as a footnote cross reference.

On July 16th, 2008, the City Improvement Officer held a hearing on the Complaint of Unfit Building at which time Appellant Garner testified as to the applicability of RCW 19.27.180 so recorded for the record. During rebuttal, Mr. Bailey noted that RCW 19.27.180 includes exceptions for buildings that are substantially remodeled or rehabilitated, or to any work performed on a new or existing foundation. This statement, an anomaly at the hearing, as RCW 19.27.180 was not recognized nor part of the FWCC, though adopted by reference, but not amended nor incorporated.

On July 29, 2008, the City Improvement Officer issued a Determination Findings of Fact and Order. Although required at

that time to rule on issues brought before the Hearing, the City Improvement Officer stated in FINDINGS OF FACT , page 3, at 13) “There is a pending lawsuit between the respondent and City. As a result, the Improvement Officer will not comment on issues raised by the parties that are not germane to this proceeding, including but not limited to provisions of Chapter 19.27 RCW and affects therefrom.” It should be duly noted that Chapter 19.27 RCW is the entire Washington State Building Code and parts thereof were used in the Complaint of Unfit Building. The administrative findings were appealed to the City Appeals Commission.

On September 18, 2008, the Garner Appeal Transcript provided by the City Appeals Commission provides insight into the issues before this Commission. The hearing officer, Mr. Beets, provided this, “ ...this is kind of a heads up to the City’s counsel that I’d like him during his comments to respond to the RCW 19.27.180 provision regarding affordable housing and relocated homes not having to be retrofitted to standards that superseded the original building standards. Okay.” Mr. Aaron

Walls, Federal Way Attorney, then stated for the record, that; “..Mr. Garner...feels the Unfit Building Ordinance is a Building Code, and it really is not. It’s not in the Building Code Chapter. Chapter 5 is the Building Code.” Counsel then stated, “...non-conforming is a concept in the zoning codes, not building codes and not nuisance codes. It’s a zoning code issue.” The finding of the City Improvement Officer were affirmed, and appealed.

On June 16th, 1992, by Ordinance No. 92-143 the City, as stated therein was required to adopt the State of Washington Uniform Building Code as amended by the State Building Code Council pursuant to RCW 19.27.031; Ordinance No. 90-33 was amended in part by: “15.08.010 BUILDING CODE adopted. The Uniform Building Code (UBC), [1988] 1991 Edition,....both as published by the International Conference of Building Officials and as adopted by Administrative Code are adopted by this reference as if set forth in full... “

“ Ordinance No. 90-33 is amended as follows; 15.22.010 Code for the abatement of dangerous Buildings adopted.

The Uniform Code for the abatement of Dangerous Buildings (UCSDS) [1988] 1991 Edition, as published by the International Conference of Building Officials, is adopted by this reference as if set forth in full, subject to the amendments, additions or deletions set forth in this Chapter.”

Ordinance No. 90-33 is amended as follow;

Section 28. There is hereby created a new section 15.10.020 County rules and regulations adopted—Relating to on-site sewage disposal systems of the City of Federal Way Municipal Code to read as follow:

Section 29. There is hereby created a new section 15.10.30 Administration of the Federal Way Municipal Code to read as follows: 15.10.030 Administration. In addition to the regulations set forth in the Uniform Plumbing Code, the administrative regulations set forth in section 15.10.040 through 15.10.120 shall also apply.

Section 30. There is hereby created a new section 15.10.040 Application and Scope of the City of Federal Way Municipal Code to read as follows:

15.10.040 Application and Scope. The provisions of this Code shall apply to all new construction, relocated buildings, and to any alterations, repairs or reconstruction, *except as provided otherwise in this code.* (Emphasis added)

Section 31. There is hereby created a new section 15.10.50 Right of Entry of the Federal Way Municipal Code to read as follows:

15.10.50 Right of Entry. The Building Official or his designated agent shall have the right of entry, during usual business hours, to inspect any and all buildings and premises in the performance of his duties.

The 1974 creation of the RCW prompted, "RCW 19.27.20 Purposes-Objectives-Standards.

The purpose of this chapter is to promote the health, safety and welfare of the occupants or users of buildings and structures and the general public by the provision of building codes throughout the state. Accordingly, this chapter is designed to effectuate the following purposes, objectives, and standards:

(1) To require minimum performance standards and requirements for construction and construction materials,

consistent with accepted standards of engineering, fire and life safety.

(2) To require standards and requirements in terms of performance and nationally accepted standards.

(3) To permit the use of modern technical methods, devices and improvements.

(4) To eliminate restrictive, obsolete, conflicting, duplicating and unnecessary regulations and requirements which could unnecessarily increase construction costs or retard the use of new materials and methods of installation or provide unwarranted preferential treatment to types or classes of materials or products or methods of construction. (Emphasis added)

(5) To provide for standards and specifications for making buildings and facilities accessible to and usable by physically disabled persons.

(6) To consolidate within each authorized enforcement jurisdiction, the administration and enforcement of building codes.

[1985 c 360 § 6; 1974 ex.s. c 96 § 2.] “

“RCW 19.27.060 Local building regulations superseded –

Exceptions. (1) The governing bodies of counties and cities may amend the codes enumerated in RCW 19.27.031 as amended and adopted by the state building code council as they apply within their respective jurisdictions, but the amendments shall not result in a code that is less than the minimum performance standards and objectives contained in the state building code.

(a) No amendment to a code enumerated in RCW 19.27.031 as amended and adopted by the state building code council that affects single family or multifamily residential buildings shall be effective unless the amendment is approved by the building code council under RCW 19.27.074(1)(b)."

There is no verifiable evidence that the state building council approved any of the amendments of the City relative to (a) above, nor that the state building council had the authority to approve the new Section 31 effectively setting aside Constitutional rights of the Fifth and Fourteenth Amendments.

FWMC "Section 31. There is hereby created a new section 15.10.50 Right of Entry of the Federal Way Municipal Code to read as follows: 15.10.50 Right of Entry. The Building Official or

his designated agent shall have the right of entry, during usual business hours, to inspect any and all buildings and premises in the performance of his duties.”

Transcripts of City of Federal Way v. Charles Garner 08-2-37690-7 KNT, Judge McDermott presiding on Sept. 17, 2009, provides the following: 1) Mr. Walls, former City Attorney, had stated in prior Court proceedings of this Appeal cause number, that the code was wrong, and that permission was required and that fact was then acknowledged by the Court; 2) The Unconstitutional claim by Mr. Garner was not challenged by the new City Attorney, Mr. Beckwith; 3) The Court had ordered, without warrant or probable cause, that Mr. Garner was to provide the City access to the property; and 4) That the City was aware of the issues of an Inverse Condemnation claim. (It is unknown as to the knowledge of the City that the claim was not “ripe” for adjudication until after Judge McDermott’s decision on Motion for Reconsideration on Order Affirming Appeal. No. 08-2-37690-7 KNT.)

“19.27.074 State building code council -- Duties -- Public meetings – Timing of code changes.

(1) The state building code council shall:

(a) Adopt and maintain the codes to which reference is made in RCW 19.27.031 in a status which is consistent with the state's interest as set forth in RCW 19.27.020. In maintaining these codes, the council shall regularly review updated versions of the codes referred to in RCW 19.27.031 and other pertinent information and shall amend the codes as deemed appropriate by the council;

(b) Approve or deny all county or city amendments to any code referred to in RCW 19.27.031 to the degree the amendments apply to single family or multifamily residential buildings;

(c) “As required by the legislature, develop and adopt any codes relating to buildings; and.....” (Emphasis added)

RCW 19.27.180

“Residential Building moved into a city or county – Applicability of building codes and electrical installation requirements.

(1) Residential buildings or structures moved into or within a county or city are not required to comply with all of the requirement of the codes enumerated in chapters 19.27 and 19.27A RCW, as amended and maintained by the state building code council and chapter 19.28 RCW, if the original occupancy classification of the building or structure is not changes as result of the move.

(2) This section shall not apply to residential structures or buildings that are substantially remodeled or rehabilitated, nor to any work performed on a new or existing foundation.

(3) For the purposes of determining whether a moved building or structure has been substantially remodeled or rebuilt, any cost relating to preparation, construction, or renovation of the foundation shall not be considered. [1992 c § 1; 1989 c 313 § 2]

Notes:

Finding – 1989 c 313: “The legislature finds that moved buildings or structures can provide affordable housing for many persons of lower income; that many of the moved structures or buildings were legally built to the construction standards of their day; and

that requiring the moved building or structure to meet all new constructions codes may limit their use as an affordable housing option for persons of lower income.

The legislature further finds that application of the new construction code standards to moved structure or building that meets the codes at the time it was constructed does not need to comply with any updated state building code unless the structure is substantially remodeled or rebuilt” [1989 c 313 § 1.]”

WAC Code has been revised over the years and changed the wording, relating to RCW 19.27.180, as it then read in 1989 and was subsequently codified into WAC in 1991.

WAC 51-10-240 effective 7/1/91

”Residential buildings moved into a city or county — Applicability of building codes and electrical installation requirements.

(1) Residential buildings or structures moved into or within a county or city are not required to comply with all of the requirements of the codes enumerated in chapters 19.27 and 19.27A RCW, as amended and maintained by the state building code council and chapter 19.28 RCW, if the original occupancy

classification of the building or structure is not changed as a result of the move.

(2) This section shall not apply to residential structures or buildings that are substantially remodeled or rehabilitated, nor to any work performed on a new or existing foundation.

(3) For the purposes of determining whether a moved building or structure has been substantially remodeled or rebuilt, any cost relating to preparation, construction, or renovation of the foundation shall not be considered [1992 c 79 § 1; 1989 c 313 §

[2.] NOTES:

Finding -- 1989 c 313: "The legislature finds that moved buildings or structures can provide affordable housing for many persons of lower income; that many of the moved structures or buildings were legally built to the construction standards of their day; and that requiring the moved building or structure to meet all new construction codes may limit their use as an affordable housing option for persons of lower income.

The legislature further finds that application of the new construction code standards to moved structures and buildings

present unique difficulties and that it is the intent of the legislature that any moved structure or building that meets the codes at the time it was constructed does not need to comply with any updated state building code unless the structure is substantially remodeled or rebuilt." [1989 c 313 § 1.]

WAC 51-50-3410 effective date 7/1/10

"Section 3410 — Moved structures.

3410.1 Conformance. Buildings or structures moved into or within the jurisdiction shall comply with the provisions of this code, the International Residential Code (chapter 51-51 WAC), the International Mechanical Code (chapter 51-52 WAC), the International Fire Code (chapter 51-54 WAC), the Uniform Plumbing Code and Standards (chapters 51-56 and 51-57 WAC), the Washington State Energy Code (chapter 51-11 WAC) and the Washington State Ventilation and Indoor Air Quality Code (chapter 51-13 WAC) for new buildings or structures.

EXCEPTION: Group R-3 buildings or structures are not required to comply if:

1. The original occupancy classification is not changed; and
2. The original building is not substantially remodeled or rehabilitated.

For the purposes of this section, a building shall be considered to be substantially remodeled when the costs of remodeling exceed 60 percent of the value of the building exclusive of the costs relating to preparation, construction, demolition or renovation of foundations. (Emphasis added)

WAC 51-50-007 Agency filings affecting this section
Exceptions.

The exceptions and amendments to the International Building Code contained in the provisions of chapter 19.27 RCW shall apply in case of conflict with any of the provisions of these rules.

Codes referenced which are not adopted through RCW 19.27.031 or chapter 19.27A RCW shall not apply unless specifically adopted by the authority having jurisdiction.

The 2009 International Existing Building Code is included in the adoption of this code in Section 3401.5 and amended in WAC 51-50-480000.

WAC 51-50-480101 Agency filings affecting this section

Section 101 — General.

101.4.2 Buildings previously occupied. The legal occupancy of any building existing on the date of adoption of this code shall be permitted to continue without change, except as is specifically covered in this code, the International Fire Code, or as deemed necessary by the code official to mitigate an unsafe building. For the purpose of this section, "unsafe building" is not to be construed as mere lack of compliance with the current code.

807.4.3 Limited structural alteration. Where any building or structure undergoes less than substantial *improvement*, the evaluation and analysis shall demonstrate that the altered building or structure complies with the loads applicable at the time the building was constructed.

51-51-0102 Agency filings affecting this section

Section R102 — Applicability.

R102.7.2 Moved buildings. Buildings or structures moved into or within a jurisdiction shall comply with the provisions of this code, the International Building Code (chapter 51-50 WAC), the

International Mechanical Code (chapter 51-52 WAC), the International Fire Code (chapter 51-54 WAC), the Uniform Plumbing Code and Standards (chapters 51-56 and 51-57 WAC), the Washington State Energy Code (chapter 51-11 WAC) and the Washington State Ventilation and Indoor Air Quality Code (chapter 51-13 WAC) for new buildings or structures.

EXCEPTION: Group R-3 buildings or structures are not required to comply if:

1. The original occupancy classification is not changed; and
2. The original building is not substantially remodeled or rehabilitated. For the purposes of this section a building shall be considered to be substantially remodeled when the costs of remodeling exceed 60 percent of the value of the building exclusive of the costs relating to preparation, construction, demolition or renovation of foundations.

WAC 51-50-0310 Agency filings affecting this section:

Section 310 — Residential Group R. -
R-3 Residential occupancies where the occupants are primarily permanent in nature and not classified as Group R-1, R-2, R-4 or

I, including: Buildings that do not contain more than two dwelling units. Adult care facilities that provide accommodations for five or fewer persons of any age for less than 24 hours. Child care facilities that provide accommodations for five or fewer persons of any age for less than 24 hours. Congregate living facilities with sixteen or fewer persons. Adult care within a single-family home, adult family homes and family child day care homes are permitted to comply with the International Residential Code.”

Upon incorporation, by definition of Ordinance 90.43 (02/28/90), the building became classified as non-conforming because of definition there in, as it had not been built to City code prior to incorporation.

By Ordinance 89-14 (Published 01/10/90 and effective date of incorporation (02/28/90)) There was established a Criminal penalty for failure to comply with any ordinance of the City, or regulation adopted by the City Council pursuant thereto.

“...NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF FEDERAL WAY, WASHINGTON. DO ORDAIN AS FOLLOWS:

Section 1. Violation -Penalty.

A. Unless otherwise provided; any person violating any of the provisions or failing to comply with any of the mandatory requirements of any ordinance of the City, or any rule or regulation adopted by the city council pursuant thereto, shall be guilty of a misdemeanor or gross misdemeanor. Except in cases where a different punishment is prescribed by any ordinance of the City, any person convicted of a misdemeanor or gross misdemeanor under the ordinances of the city shall be punished by a fine not to exceed \$5,000 or imprisonment for a period of not more than one year or by both such fine and imprisonment.

B. This ordinance shall not preclude and shall be deemed to be in addition to administrative and civil remedies as may be set forth in ordinances of the City.

C. Each and every day during any portion of which a violation of any of the provisions of the ordinances of the City is committed and continues shall be deemed to be a separate offense.

Section 2. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or

unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 3. This ordinance shall be effective as of the date of incorporation which is more than five (5) days after publication of an approved summary consisting of the title to this ordinance.”

ASSIGNMENT OF ERRORS

SUMMARY JUDGMENT RAP 9.12

1. The Court erred by not taking into consideration the issues of the Summons and Complaint of the Cause No. 09-2-09440-3 KNT, that being a Constitutional claim of a “de facto taking” not found in any other Summons and Complaint and basing a *res judicata* finding thereon.

Upon signing the final order, by Judge McDermott, Administrative Appeal, King County Cause No. 08-2-37690-7 KNT on October 15, 2009, of which the Court had knowledge, the accrued right matured and became tentatively enforceable through litigation. Such accrued right had not been litigated before in any Court.

2. Failure of the Court relative to a Summary Judgment, after evidence was presented before it, to not rule in the light most favorable to the non-moving party.

a. There are genuine issues of material facts in dispute between the Parties involved.

b. The moving party is not entitled to judgment as a matter of law.

Evidence provided in the TP at page 8 at paragraph 3, that in the new lawsuit filed in 2009, "...that there was a - - what he calls a per se taking of his property." The file date of No. 09-2-09440-3 KNT (now before this court on appeal) was 03/31/2009 and Judge McDermott's last ORDER ON CIVIL MOTION on an

administrative appeal, No. 08-2-37690-7 KNT was 10/15/2009 which was approximately six and a half months later.

To put this in perspective the claim had to be labeled “de facto taking” in the No. 09-2-094403-3 KNT because no prescribed taking, subject to adjudication tentatively, had taken place until after Judge McDermott signed the final order returning the issues before him at the time, to the City’s Appeal Commission. Notwithstanding the aforesaid Order and action, the City still had the ability to restrain any act that would constitute a final action. It chose not to thereby finalizing the issue of the Reverse Condemnation being “ripe”.

3. Error of the Court in its consideration of the required elements of the moving party’s claim to *res judicata* or claim preclusion, and its ruling thereof.

This Cause was filed in Superior Court because the “de facto taking” claim was believed to be imminent, by a future Order of the Superior Court and/or action by the City, and therefore would become “ripe” at a future date, and would require adjudication. This Cause is not an administrative appeal by nature and

contained the new element of monetary damages for a “taking”. Relative to the comparative lawsuit alleged to constitute former criteria for *res judicata* and alleged to have been filed in 2008, the records show that no lawsuits were filed in 2008. There was however on August 14, 2006 a lawsuit filed alleging, “Denial of Due Process and Violation of § 1983” and moved to Federal District Court. The consistency of claims is one of the tenets of *res judicata*, and was missing on the Motion for Summary Judgment.

4. Error of the Court in any consideration of “claimed preclusion”. Reverse Condemnations are deemed reversible up until a final Court decision or other action which make them “ripe” for adjudication creates a bar to bringing a Claim. This claim has a starting point of the date of Incorporation of the City of Federal Way and is ongoing; however a law suit could not be brought until such time as a Court issued a decision defining an imminent taking.

5. Error of the Court in ruling that an appeal of a quasi-judicial act of a City Hearing Officer and Appeals Commission by Judge

McDermott, King County Superior Court in a decision of an appeal not even relating to the issues before it could not be revisited.

The City's action that led to the appeal noted above was for an administrative action concerning an Unfit Building Citation of Code. Neither the Hearing Officer or Appeals Commission ruled on a "de facto taking".

STATEMENT OF THE CASE

SUMMARY JUDGMENT

1. Based upon the ORDER GRANTING MOTION FOR SUMMARY JUDGMENT in these proceedings and upon review of the Transcript of Proceedings, and the Clerk's Papers, it is unclear as to whether the Order was for *res judicata* and claim preclusion. (CP pg.19); (CP 25 at 14).

2. Defendant admits a new lawsuit in 2009 and that Plaintiff claimed there was a “per se taking” of his property, and alludes to the fact that an administrative appeal of a different issue constitutes the Plaintiff suing the City. (RP pg. 8); (CP pg. 24 at 17)

3. The *res judicata* doctrine does not have merits as it fails to meet the Defendants own stated criteria in (1) subject matter, (2) cause of action. (CP pg. 25-26).

4. The Case is, and always has been in the ensuing years as to whether the Legislature has the authority to include in the RCW Building Code its provisions for low cost housing and restricting the local municipality’s code enforcement police powers which led to the degradation of the building and the destruction thereof
It should be noted that other cities have accepted that premise and included it in their code.

(RP) pg. 16

ARGUMENT

The trier of fact erred, because the arguments of the moving party presented erroneous facts on which the decision was based. The filed complaint clearly stated a “de facto taking” and a claim for monetary damages and equating “per se taking” was inconsistent with the pleading as the City had not instituted Condemnation proceedings. The stated position that, “Certainly, the subject matter is the same as the previous lawsuit.” is not factual. (RP pg. 5 at 13).

Black’s Law Dictionary , Abridged 7th Addition delineates de facto: Actual; existing in fact; having effect even though not formally or legally recognized.

In addition, all reasonable inferences from the allegations in the complaint must be resolved in favor of the non-moving party. Reid v. Pierce County, 136 Wn.2d 195,201,961 P.2d 333 (1998)

That cities are creatures of the sovereign state may be seen from article 11, § 10, of the State Constitution which states that the legislature shall provide for the incorporation and organization of cities and that all city charters shall be subject to and controlled by general laws.

In RCW 35.22, the legislature has adopted a code for the organization and establishment of cities of the first class, affording them certain powers of government and capabilities as corporate entities.” (State ex rel. Bowen v. Kruegel (1965) 67 Wash.2d 673, 409 P.2d)

For municipalities to assume powers not delegated to it constitutes trespass on sovereign power of state. (Annotated) State ex rel. Bowen v. Kruegel (1965) Wash.2d 673m 409 P.2d. 458;)

In light of the lengthy development leading to this appeal, there is a Constitutional issued that has arisen concerning RCW 1.12.010 Code to be liberally construed. The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction. (Last revision in 1891) (Incorporated into the RCW in 1950) In Ridley M. Whitaker v. American Telecasting Inc. 261 F.3d 196 (2nd Cir. 2001), The Federal Court system undertook a review of language construction in statutes, citing Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2nd

Cir. 1993) (“[A] court should presume that [a] statute says what it means.”). “If the words of the statute are unambiguous, judicial inquiry should end, and the law interpreted according the plain meaning of its words.” Id. Citing *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698,701 (1981)). “[A] court will not adopt a different construction absent clear legislative history contradicting the plain meaning of the words.” *United States v Holroyd*, 732 F.2d 1122, 1125 (2d Cir. 1984)

The words, “shall be liberally construed”, has a connotation of ambiguity and is followed by “shall not be limited by any rule of strict construction.” which is unambiguous creating a statute which reflects the former. The hypothesis exists that the City liberally construed RCW 19.27.180 as not applicable and was not limited, nor constrained, by any rule of strict construction of use thereof.

The State of Washington Constitution Article XI § 11 Police and Sanitary Regulations provide: Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with

general laws. Adopted 1889. (Note: RCW 1.04.010 provides: "Said code is intended to embrace in a revised, and consolidated form and arrangement all the laws of the state of a general and permanent nature.")

The "general laws of the state" are herein after referred to as "RCW" due to commonality after 1950.

"Municipalities may make and enforce within its territorial limits local police regulations which are not in conflict with the RCW." (Annotated) State v. Inglis (1982) 32 Wash.App 700, 649 P.2d 163;

"Municipal corporations being creatures of and subordinate to the state, possess only those powers given by the state and may exercise them only as the state prescribes." (Annotated) Lutz v. Longview (1974) 83 Wash.2d 566,520 P.2d 1374

To the extent that the City began the process of becoming an Incorporated Municipality under the provisions of the RCW and WAC; originated Ordinances to effectuate that goal, and in the process failed to adopt RCW 19.27.180, an integral part of the State of Washington's Building Code required to be adopted by

the City, appellant Charles Robert Garner, (herein after (Garner)) was denied due process of law.

Garner owned a building, designated residential, situate in Un-incorporated King County, fee simple. Upon incorporation, by definition of Ordinance 90-43 (02/28/90), the building became classified as non-conforming because of definition there in, as it had not been built to City code prior to incorporation. By Ordinance 89-14 (Published 01/10/90 and effective date of incorporation (02/28/90)) There was established a Criminal penalty for failure to comply with any ordinance of the City, or regulation adopted by the City Council pursuant thereto.

The Criminal penalty for failure to comply, if it is as, "....that [a] statute says what it means", it is not contingent on a Violation Notice-Order to Correct, but simply accrues when the violation occurs.

The respective provisions of the United States/and Washington State/Constitutions prohibiting the passage of ex post facto laws have consistently been held to apply only to legislation of a criminal nature. *Johannessen v. United States*, 225 U.S.

227, 56 L.Ed. 1066,325 S.Ct 613 (1912); *Carpenter v. Butler*, 32 Wn.2d 371, 201 P.2d 704 (1949); *State ex rel. Hagen v. Superior*, 139 Wash. 454, 247 Pac.942 (1926). In *State v. Lopeman*, 143 Wash. 99,254 Pac. 454 (1927) the court described and defined an ex post facto law as follows:

“....an ex post facto law is “...1st every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when [(Orig. Op. Page 4)] committed. 4th Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.’ *Calder v. Bull*, 3 Dall. 386, 1 U.S. L.Ed. 648; 6 R.C.L. 276.”

Appellant Garner asserts that prior to the enactment (passing) of Ordinance 89-14 (Incorporation of the City) he was innocent at

the time and made criminal when the City noted a failure to comply with any ordinance of the City, or regulation adopted by the City.

Appellant Garner asserts that the Unfit Building law changed the punishment of monetary fines and imprisonment to include loss of property and is different from the law established earlier.

Appellant Garner asserts that the Unfit Building Ordinance/Law altered the legal rules of evidence by refusing to allow or order a rule on evidence so submitted to the Federal Way Improvement Officer and the Appeals Commission. Notwithstanding the prohibition of passing ex post facto laws, the City of Federal Way created Code that substantially altered the RCW and WAC enacted prior to its incorporation that impacted Garner by depriving him of his contract with King County and vested accrued rights.

The new Federal Way Revised Code, herein after (FWRC) is consistent with the prior Federal Way City Code, (herein after FWCC) and the prior FWMC when it states at FWRC 1.05.070

Code does not affect prior offenses, rights, etc. “Nothing in this Code or the ordinances adopting this code shall affect any offense or act committed or done, or any penalty or forfeiture incurred, or any contract or right established or accruing before the effective date of this Code.” (Code 2001 §1-7) (Emphasis added)

In the United States, the federal government is prohibited from passing ex post facto laws by clause 3 of Article I, section 9 of the U.S. Constitution and the states are prohibited from the same by clause 1 of Article I, section 10. As to the Constitution of Washington’s Article 1, § 2., We look to Rafferty, In re (1890) 1 Wash. 382, 25 P. 465.

1.05.070 Code does not affect prior offenses, rights, etc.

(Code 2001 § 1-7.)

1.05.080 Effect

Nothing in this Code or the ordinance or a portion of this Code shall not affect any punishment or penalty incurred before the repeal took effect, nor any suit, prosecution or proceeding

pending at the time of the repeal, for an offense committed under the provision repealed. (Code 2001 § 1-8.)

“When determining if a statute is to be given prospective or retrospective application, one is usually faced with the rule that statutes have no retroactive effect unless the legislative intent is so expressed.” In re Cascade Fixture Co., 8 Wn.2d 263, 111 P.2d 991 (1941).

However, an exception to this general rule is that an act has a retroactive application when it relates to practice, procedure, or remedies, and does not affect a contractual or vested right. Nelson v. Dept. of Labor & Industries, 9 Wn.2d 621, 115 P.2d 1014 (1941).

As to the assertion held by the City, through its FWRC that “The building official or designated agent has the right of entry...”, forcible or not, begs for Constitutional interpretation.

13.10.010 Right of entry.

The building official or designated agent shall have the right of entry, during usual business hours, to inspect any and all buildings and premises in the performance of his or her duties.

In cases where federal preemption is found, the federal law will supersede state statute only to the extent necessary to protect achievement of the aims of the federal enactment. State v. Williams (1980) 94 Wash.2d 531,617 P.2d 1012

.05.070 Code does not affect prior offenses, rights, etc.

Nothing in this Code or the ordinances adopting this Code shall affect any offense or act committed or done, or any penalty or forfeiture incurred, or any contract or right established or accruing before the effective date of this Code. (Code 2001 § 1-7.)

Standing:

(I). Charles Robert Garner does own, fee simple, which property described as 31616 6th Ave. SW, Federal Way, WA. The property was stipulated, and based in the complaint. Said property was a legal non-conforming property when the City of Federal Way incorporated under the general laws of the State of Washington. The City FWMC invalidated that legal non-conforming status by failing to comply with RCW 19.27. and removing the vested rights associated with private ownership of property. Said action caused twenty years of deterioration of the

building there on to such an extent that the City by Ordinance enacted an ex post facto statute to effect an Unfit Building. The building was demolished by the City without the consent of Garner, but at his expense.

(2). The action was caused by the City of Federal Way, Washington.

(3). The City of Federal Way, Washington is capable of legal or equitable redress under the General Laws of the State of Washington.

As the Supreme Court has repeatedly stated the "core" or "bedrock" elements of standing require that a plaintiff establish a (1) legally recognized injury, (2) caused by the named defendant that is (3) capable of legal or equitable redress. E.g., *Raines v. Byrd*, 521 U.S. 811, 818-19, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (noting the "bedrock requirement" of standing generally and the "strict compliance" of showing a legally recognized injury specifically); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (identifying the three "core component[s] of standing"). The party seeking to invoke the

jurisdiction of the federal courts has the burden of alleging specific facts sufficient to satisfy these three elements. See *Raines*, 521 U.S. at 818, 117 S.Ct. 2312 (plaintiffs must satisfy standing requirements "based on the complaint...");

Whitmore v. Arkansas, 495 U.S. 149, 155-56, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-56, 110 S.Ct. 1717.

Contrary to *Schmier's* assertions, moreover, the injury that a plaintiff alleges must be unique to that plaintiff, one in which he has a "personal stake" in the outcome of a litigation seeking to remedy that harm. See *Raines*, 521 U.S. at 818-19, 117 S.Ct. 2312; *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In addition, the plaintiff must have sustained a "concrete" injury, "distinct and palpable ... as opposed to merely abstract." *Whitmore*, 495 U.S. at 155, 110 S.Ct. 1717; accord *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130

(discussing the standing requirement for a "concrete and particularized" injury). And that injury must have actually occurred or must occur imminently; hypothetical, speculative or other "possible future" injuries do not count in the standings calculus. See *Whitmore*, 495 U.S. at 155, 110 S.Ct. 1717; accord *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130;

Allen v. Wright, 468 U.S. at 751, 104 S.Ct. 3315;

Lyons, 461 U.S. at 101-02, 103 S.Ct. 1660. Though these standing principles do not readily lend themselves to "mechanical application," *Allen v. Wright*, 468 U.S. at 751, 104 S.Ct. 3315, nor do they require an "ingenious academic exercise in the conceivable," see *Lujan*, 504 U.S. at 566, 112 S.Ct. 2130.

The amount specified in the Claim prepared according to the FWRC, and on file with the City amounts to over \$574,000, which exceeds the threshold for review.

CONCLUSION

The City by an extensive amount of Administrative procedures bypassed the authority of the State Legislature's intent when it passed RCW 19.27.180 in 1989 and stipulated it in the RCW and the WAC. Garner was thereby deprived of the right, use, and enjoyment of the property listed. This also led to the degradation of the property without just compensation. As by the FWRC a claim for damages was filed with the City and awaits action thereon. The relief sought so as to effect savings in cost of further litigation on this issue, and to ensure that the City complies with the RCW 19.27, State Building Code, it would be proper to vacate the Summary Judgment Order, Order the City to Comply with the RCW 19.27, and let the claim for damages proceed. Absent agreement on the propriety of the previous relief sought, the Summary Judgment should be reversed and remanded back to Superior Court for trial.

Dated: 1 November, 2010

A handwritten signature in black ink, appearing to read "Charles R. Garner", is written over a horizontal line.

Charles R. Garner

Pro Se

29811 Marine View Dr. SW

Federal Way, WA. 98023-3422

253 941 2511