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DIVISION II

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STATE OF WASHINGTON
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NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST

Appellant,

v.

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

Respondent.

PLAINTIFF'S/APPELLANT'S PETITION FOR REVIEW

ORIGINAL

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A. IDENTITY OF PETITIONER.

Plaintiff/Appellant Paul Post (“Petitioner”) asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION.

Petitioner appeals the decision of Court of Appeals Division II filed on August 14, 2007. A copy of the decision is in the Appendix 1.

C. ISSUES PRESENTED FOR REVIEW.

1. WHETHER THE LAND USE PETITION ACT (“LUPA”) APPLIES TO AN ACTION FOR INJUNCTION OR DECLARATORY JUDGMENT TO DETERMINE AN ORDINANCE TO BE UNCONSTITUTIONAL AND TO ENJOIN ENFORCEMENT OF SAID ORDINANCE.
2. WHETHER LUPA APPLIES TO DAILY FINES ISSUED BY BUILDING INSPECTORS WHERE THE ORDINANCE AUTHORIZING SAID FINES PRECLUDES AN ADMINISTRATIVE HEARING BY A BUILDING OFFICIAL OR THE CITY HEARINGS EXAMINER.
3. WHETHER TMC 2.01.060 (D) (6) AND (E) (7) CONFLICT WITH THE ONLY STATE STATUTE THAT AUTHORIZES PENALTIES OR FINES FOR MINOR OFFENSES.
4. WHETHER DAILY FINES THAT ARE NOT APPEALABLE ARE REQUIRED TO BE APPEALED THROUGH LUPA PROCEDURES.

5. WHETHER PETITIONER RAISED FACTUAL ISSUES THAT REQUIRE A TRIAL TO DETERMINE IF DEFENDANT/RESPONDENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER ARTICLE I, SECTION 14 OF THE WASHINGTON STATE CONSTITUTION AND THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION, WHICH DECLARES ALL CITIZENS SHALL BE FREE FROM EXCESSIVE FINING.
6. WHETHER TMC 2.01.060 (D) (6) AND (E) (7) VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS GIVEN UNDER ARTICLE I, SECTION 3 OF THE WASHINGTON STATE CONSTITUTION AND THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION BY ALLOWING ONLY AN APPEAL OF THE ORIGINAL \$125.00 PENALTY.
7. WHETHER PROVISIONS IN TMC 2.01.060 (D) (E) ALLOWING ONLY APPEALS OF THE FIRST CIVIL PENALTY (\$125.00) DENIES PETITIONER'S CONSTITUTIONAL RIGHTS TO SUBSTANTIVE DUE PROCESS GIVEN HIM IN THE U.S. CONSTITUTION, FIFTH AMENDMENT, AND THE WASHINGTON STATE CONSTITUTION, ARTICLE I, SECTION 3.

D. STATEMENT OF THE CASE.

Tacoma Municipal Code ("TMC") titled 2.01 was adopted on March 16, 1999.¹ Under the original ordinance, a person could request an administrative appeal for the initial notice of violation, the subsequent \$125.00 civil penalty, and for each \$250.00 civil penalty imposed thereafter.²

In November of 2000, the code was revised to allow only the administrative

¹ CP 392.

appeals of the notice of first violation and the first imposition of the \$125.00 civil penalty (TMC 2.01.060 (D) (6) for substandard buildings and TMC 2.01.060 (E) (5) for derelict buildings.)³ Any further civil penalty assessments were authorized to be issued by building inspectors at the rate of \$250.00 per day.⁴ The City considers the inspectors to be the highest level of officers under TMC 2.01.060. If the initial notice of violation or the first civil penalty is not appealed to the building official under TMC 2.01.060 (D) (6) or TMC 2.01.060 (E) (5) or to the city hearings examiner pursuant to TMC 2.01.60 (D) (7) or TMC 2.01.060 (E) (6), the initial notice of violation is considered the final determination.⁵ The first penalty assessment under both (D) and (E) of TMC 2.01.060 is \$125.⁶ All subsequent penalties are assessed at the rate of \$250.00 pursuant to the above-referenced code. (The Court of Appeals Decision in the footnote on Page 8 chastised Post's counsel for not having cited any authority for Post's position that he had no right to appeal the inspectors. This is strange in that the above-referenced cites are Page 6 of Appellant's Brief, Page 4 of Appellant's reply brief, and Page 35 of Respondent's Brief. It is additionally strange since the City attorney was asked during oral argument at the Court of Appeals whether it was true that

2 Declaration of Charles Solverson, CP 392-393.

3 CP 393.

4 TMC 2.01.060 (Appendix 2); CP 393-394.

5 CP 393.

Post had no right to appeal any of the \$250.00 per day fines and admitted the same.) Also, the above statement of the case was taken directly from the Declaration of the Department Head of the City of Tacoma, Building Department. Since the amendment to the act in 2000, the City has imposed continuous \$250.00 fines.⁷ Mr. Post claimed the fines continued with no right to appeal even though several of the properties had repairs near total completion.⁸ Petitioner's declaration showed the fines continued to September 12, 2005, approximately four and one-half months after this lawsuit was filed.⁹ The most egregious example of the continued fining was a twelve-plex that had been nearly totally repaired and painted with only six gables that were hard to reach that were left unpainted.¹⁰ Interestingly, the City Fire Department, during annual inspection, noted how nice the building looked even at a time the building inspectors were continuing to fine the property at the rate of \$250.00 per day.¹¹

Plaintiff filed a complaint for declaratory judgment and injunction on April 30, 2005. Plaintiff filed an amended complaint December 22, 2005.¹²

6 CP 392, TMC 2.01.060 (D) (6) and (E) (7), Schedule F (Appendix 2).

7 CP 139, 142, 157, 165, 173, 181.

8 CP 213-260.

9 CP 222-223. Petitioner's declaration stated fines were continued to the date of his signing the declaration.

10 CP 222-223.

11 CP 223.

12 CP 293-301.

Defendant filed a motion for summary judgment August 16, 2005¹³, and a second motion for summary judgment February 8, 2006. Plaintiff filed his motion for summary judgment February 16, 2006.¹⁴ The court granted the City's motion for summary judgment by order dated April 14, 2006.¹⁵

The Court of Appeals issued its decision August 14, 2007. Said decision determined LUPA was Petitioner's only recourse to raise the constitutional issues involved in this case. It further ruled that LUPA requires Petitioner to appeal constitutional issues through the hearings examiner even for declaratory judgment and injunction for future enforcement actions taken by the city building inspectors. The Court of Appeals further found the Petitioner did not show and the record did support Petitioner's claim the ordinance precluded appeal of the daily fines.

Much of the argument in this petition involves a significant question of law under the Washington State Constitution and the U.S. Constitution pursuant to RAP 13.4 (3) and also involves an issue of substantial public interest that should be determined by the Supreme Court pursuant to RAP 13.4 (b) (4). The Court of Appeals recognized this in its decision on Page 11, Footnote 7, and stated, "We are concerned that arbitrary and capricious action could be taken under TMC 2.01.060 (D) (4) (e)-(f) and (5), which indicate

13 CP 194-195.

14 CP 436-437.

that fines “may” be assessed every calendar day and that enforcement action continues until *all* outstanding violations have been corrected. For a property owner who has repaired most or nearly all of the reported deficiencies, it could be unreasonable to continue to impose the same amount of fine as initially imposed.”

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE LAND USE PETITION ACT (“LUPA”) DOES NOT APPLY TO AN ACTION FOR INJUNCTION OR DECLARATORY JUDGMENT TO DETERMINE AN ORDINANCE TO BE UNCONSTITUTIONAL AND TO ENJOIN ENFORCEMENT OF SAID ORDINANCE.¹⁶

Petitioner brought an action against the City of Tacoma for declaratory judgment to rule that TMC 2.01.060 is unconstitutional and for an injunction to enjoin future daily penalties being imposed by said building inspectors. The hearings examiner has no authority to make rulings regarding constitutional rights, statutory construction, or equitable rights.¹⁷ The hearings examiner also has no authority to enjoin future enforcement of an ordinance.¹⁸ This issue complies with RAP 13.4 (b) (4) in that it involves an

15 CP 511-515.

16 *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn.App. 777, 964 P.2d 1211 (1998).

17 *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wash.2d 255, 534 P.2d 33 (1975); *Chaussee v. Snohomish County Council*, 38 Wash.App. 630, 689 P.2d 1084 (1984); *Bare v. Gorton*, 84 Wn.2d 380, 526 P.2d 379 (1974); *Prisk v. City of Poulsbo*, 46 Wn.App. 793, 732 P.2d 1013 (1987).

18 *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, *supra*; *Chaussee v. Snohomish County Council*, *supra*; *Bare v. Gorton*, *supra*; *Prisk v. City of Poulsbo*, *supra*.

issue of substantial public interest that should be determined by the Supreme Court. The Court of Appeals and Supreme Court have recently ruled in a number of cases (i.e., *James v. Kitsap County*, 154 Wn.2d 572, 115 P.3d 286 (2005); *Harrington v. Spokane County*, 128 Wn.App. 202, 114 P.3d 1233 (2005); *WCHS, Inc., v. City of Lynnwood*, 120 Wn.App. 668, 86 P.3d, *review denied*, 152 Wn.2d 1034 (2004)) on the issue of whether certain issues must be appealed through the Land Use Petition Act.

In *James v. Kitsap County*, the issue regarding the validity of the county ordinance had already been determined. The only issue therefore was whether the plaintiff had a right to be reimbursed for funds collected under the invalid ordinance. In the case at hand, the only issue before the court was the validity of the ordinance. The fining continued even after the complaint was filed.¹⁹ Even if Petitioner had the right to appeal each individual penalty, under LUPA, he still should have the right to stop the enforcement of an unconstitutional ordinance in the future.

2. LUPA DOES NOT APPLY TO DAILY FINES ISSUED BY BUILDING INSPECTORS WHERE THE ORDINANCE AUTHORIZING SAID FINES PRECLUDES AN ADMINISTRATIVE HEARING BY A BUILDING OFFICIAL OR THE CITY HEARINGS EXAMINER.

LUPA states that only land use decisions are subject to the procedures

¹⁹ CP 222-223.

under LUPA.²⁰ A land use decision is defined as a final determination by a local jurisdiction's body or officer with the highest level of authority to make determinations including those with authority to hear appeals. The Court of Appeals found that the Hearings Examiner is the officer with the highest level of authority.²¹ As the City of Tacoma's Building Department director states in his declaration at CP 392 and 393, the building inspectors' are the persons determined to have the highest authority to determine daily fines. TMC 2.01.060 (D) (6) and (E) (7) specifically state there is only an appeal from the first fine and no appeal from the daily fines. Since the inspectors are not the body or officer with the highest level of authority, the decisions by the inspectors are not land use decisions as claimed by Charles Solverson²² and by the City's attorney²³.

3. TMC 2.01.060 (D) (6) AND (E) (7) CONFLICT WITH THE ONLY STATE STATUTE THAT AUTHORIZES PENALTIES OR FINES FOR MINOR OFFENSES.²⁴

In *James v. Kitsap County*, the Supreme Court determined that RCW 82.02.050 and 070 specifically allow enforcement of impact fees under LUPA referring directly how the impact fees were to be collected and spent pursuant to RCW 36.70A.070. RCW 36.70C has no provision allowing

20 RCW 36.70C.020 (Appendix 13)

21 Court of Appeals Decision, Page 8. (Appendix 1)

22 CP 392-393.

23 Respondent's Responsive Brief at Page 35 (Appendix 9)

imposition of fines or penalties. The state statute that allows cities to impose fines or penalties is RCW 7.80.020. That statute designates the amount of fines allowed for minor offenses and the notice provisions for said fines. The only other statute giving cities authority to impose fines is RCW 35.22.280. There is nothing in either statute that allows daily fines. In addition, there is nothing that allows the compounding of the daily fines up to an amount of \$84,000.00 in either statute. "In determining whether a local ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."²⁵ "A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits, and where such a conflict is found to exist, under the principle of conflict preemption, the local regulation is invalid."²⁶ Therefore, TMC 2.01.060 (D) (4) and (E) (3) is an ordinance being in excess of the authority given under state law and violates the Washington State Constitution, Article XI, Section 11.

4. DAILY FINES THAT ARE NOT APPEALABLE ARE NOT REQUIRED TO BE APPEALED THROUGH LUPA PROCEDURES.

The case of *WCHS v. Lynnwood*, supra, determined that LUPA does

24 RCW 7.80.010; *James v. Kitsap County*, 154 Wn.2d 572, 115 P.3d 286 (2005).

25 *State v. Fisher*, 132 Wash.App. 26, 130 P.3d 382 (Wash.App. Div. 1, 2006).

26 *Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept.*, 153 Wash.2d 657, 105 P.3d 985 (Wash., 2005).

not apply to a local authority's decisions that are not appealable. There is no question that the persons subjected to the ordinance are denied the right to appeal.²⁷ Since the trial court and Court of Appeals in the present case require LUPA appeal of issues not appealable, the two cases conflict and form a further basis for review under RAP 13.4 (b).

5. PETITIONER RAISED FACTUAL ISSUES THAT REQUIRED A TRIAL TO DETERMINE IF DEFENDANT/RESPONDENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER ARTICLE I, SECTION 14 OF THE WASHINGTON STATE CONSTITUTION AND THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION, WHICH DECLARES ALL CITIZENS SHALL BE FREE FROM EXCESSIVE FINING.

The Court of Appeals determined the constitutional issues would not be heard unless an appeal was taken by Petitioner through the LUPA process. Petitioner raised the issue of excessive fining as a factual issue in his declarations.²⁸ The City countered with declarations from its building inspectors stating the fines or penalties were not excessive.²⁹ A factual issue was raised that could only be determined by the trier of fact. The Court of Appeals acknowledged concern regarding potential arbitrary or capricious action.³⁰ Under the Court of Appeals decision, Petitioner would have to

27 Declaration of Solverson, CP 392-393, City's Brief at Page 35.

28 Declarations of Paul Post, CP 1-6, 23-26, 37-41, 213-260 434-435, and 504-505.

29 CP 42-102, and 103-136.

30 Court of Appeals Decision, Page 11, Footnote 7. (Appendix 1).

continue to appeal each individual fine through LUPA until the Superior Court determined through trial that enough is enough. The issue is further aggravated by the fact the hearings examiner has no right to hear the matter under TMC 2.01.060 (D) (6) and (E) (7). The issue of excessive fining is accumulative. According to the Court of Appeals decision indicating that all fines must be appealed through LUPA procedures does not take into account that it is the accumulation of the fines and not only each individual fine that is being challenged. There is no provision under LUPA that allows for the challenge of the accumulation. A factual issue has been raised as to whether or not the accumulation of fines on each of the 17 properties being penalized as substandard or derelict is excessive. The trial court ruled as a matter of law the fines not to be in violation of the Eighth Amendment of the U.S. Constitution and Article I, Section 14 of the Washington State Constitution. The question of whether fines or penalties are excessive is whether the fines or penalties are grossly disproportionate to the gravity of the implicated offenses.³¹ Since the hearings examiner cannot hear appeals on daily fines (TMC 2.01 (D) (6) (E) (7)), Petitioner would be required to appeal each individual fine to Superior Court through LUPA until one fine was finally determined to be excessive.

³¹ *State of Washington v. WWJ Corporation*, 138 Wn.2d 595, 980 P.2d 11957 (1999); *U.S. v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (U.S. Cal., 1998).

6. TMC 2.01.060 (D) (6) AND (E) (7) VIOLATES PETITIONER'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS GIVEN UNDER ARTICLE I, SECTION 3 OF THE WASHINGTON STATE CONSTITUTION AND THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION BY ALLOWING ONLY AN APPEAL OF THE ORIGINAL \$125.00 PENALTY.

The City admits Petitioner may only appeal the initial notice of violation or the first penalty.³² A governmental agency can meet its obligation under an individual's rights to due process if it gives said person a notice of the assessment and the rights to a hearing.³³ The constitutional elements of procedural due process are: 1) an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; 2) an opportunity to know the claims of opposing parties; 3) to meet them; and 4) a reasonable time for preparation of one's case.³⁴ In *Motley-Motley, Inc. v. State of Washington*³⁵ the Court of Appeals stated that to constitute a violation of due process in administrative proceedings, a party must be advised with regard to preparation of a defense. The notice of the daily penalties not only did not state Petitioner had a right to appeal a dialing fine, the notice also gave no indication as to the present condition claimed to

32 CP 358, 375, 392-393, 494; *See also* Respondent's Responsive Brief at Page 35 (Appendix 9).

33 *Peters v. Sjolholm*, 95 Wn.2d 871, 631 P.2d 937 (1981).

34 *Dudly v. State Department of Public Assistance*, 74 Wn.2d 17, 442 P.2d 617 (1968).

35 *Motley-Motley, Inc. v. State of Washington*, 127 Wash.App. 62, 110 P.3d 812,

be substandard or derelict of the property being fined on the date of the fine or penalty.³⁶ (Interestingly, one would think that even under LUPA procedural due process would require the daily fine notice to advise one of appellate rights as is done when the original \$125.00 fine is imposed.)³⁷

7. PROVISIONS IN TMC 2.01.060 (D) (E) ALLOWING ONLY APPEALS OF THE FIRST CIVIL PENALTY (\$125.00) DENIES PETITIONER'S CONSTITUTIONAL RIGHTS TO SUBSTANTIVE DUE PROCESS GIVEN HIM IN THE U.S. CONSTITUTION, FIFTH AMENDMENT, AND THE WASHINGTON STATE CONSTITUTION, ARTICLE I, SECTION 3.

The case of *Rivett v. City of Tacoma*³⁸ establishes the classic elements to determine whether an ordinance violates substantive due process by asking: 1) whether the regulation is aimed at achieving a legitimate public purpose; 2) whether it uses means that are reasonably necessary to achieve that purpose; and 3) whether it is unduly oppressive on the land owner. The Supreme Court in *Rivett* said the third element is usually the difficult and determinative one. The issue was raised in the trial court and the Court of Appeals as to whether or not a factual issue was raised as to whether or not the enforcement of the ordinance by the imposition of daily fines in the case at hand was duly oppressive on Petitioner. Petitioner indicated in his

Wash.App. Div. 3, (2005).

³⁶ See examples of form notices, CP 335-350, and 414-429

³⁷ Declaration of Lisa Wojtanowicz, CP 12-15, and 183-186.

³⁸ *Rivett v. City of Tacoma*, 123 Wash.2d 573 at 582, 870 P.2d 299 (1994).

declarations that the City's imposing liens based on the daily fines created problems with him in obtaining financing and taking out loans to improve the property.³⁹ The case of *Guimont v. Clarke*⁴⁰ declared that an ordinance or statute may have a legitimate purpose but be oppressive on land owners. A factual issue was raised as to whether or not all the fines accumulating on each property were on some, many, or all of the properties being penalized were oppressive. A trier of fact must make that determination. The summary judgment declaring the ordinance not being violative of Petitioner's substantive due process rights was in error. Again, the Court of Appeals decided it would not make a determination on the constitutional issues as a result of Petitioner's failure to appeal the decision through LUPA. Again, the Court of Appeals does not explain how appealing each individual fine would allow Petitioner to contest the overall oppressiveness of the accumulation of the fines on each individual property. Since TMC 2.01.060 gives the hearings examiner no authority to hear appeals of daily fines, LUPA would require the appeal of each fine to Superior Court. The burden on Petitioner would be virtually impossible.

39 CP 38.

40 *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).

F. CONCLUSION.

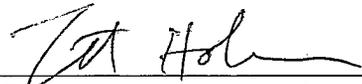
This Court should accept review for the reasons indicated in Part E and hold Respondents'/Defendants' actions in fining Appellant/Plaintiff in violation of his constitutional rights in violation of the Washington State and U.S. Constitutions and are enjoined from the date of filing. In addition, Petitioner asks the Court to determine Defendants'/Respondents' fining in excess of authority given it by the State of Washington. Alternatively, Appellant/Plaintiff asks this Court to reverse the trial court and remand for trial on the issue of whether Respondent's/Defendant's fining is excessive as practiced.

Respectfully submitted,

DATED:
September 13, 2007

EVERETT HOLUM, P.S.

By:



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APPENDIX

1. Court of Appeals Opinion Dated August 14, 2007
2. TMC 2.01.060
3. U.S. Constitution, Fifth Amendment
4. U.S. Constitution, Eighth Amendment
5. Washington State Constitution, Article I, Section 3
6. Washington State Constitution, Article I, Section 14
7. Washington State Constitution, Article XI, Section 11
8. Appellant's Brief, Page 6
9. Respondent's Responsive Brief, Page 35
10. Appellant's Reply Brief, Page 4
11. RCW 7.80.010
12. RCW 35.22.280
13. RCW 36.70C.020
14. Land Use Petition Act – RCW 36.70C

APPENDIX 1

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL POST,

Appellant,

v.

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

Respondents.

No. 34808-0-II

PUBLISHED OPINION

PENYOYAR, J. – Paul Post owns numerous properties in Tacoma that the City has designated as substandard or derelict. Beginning in 1999, the City assessed fines for several of these properties under Tacoma’s Minimum Building and Structures Code. By 2005, Post owed the City and its collection agency nearly \$400,000 in fines. Post sued, claiming that the fines were excessive, unconstitutional, and outside the City’s statutory authority. The trial court granted summary judgment to the City, finding that (1) the City’s actions were not abusive and excessive; (2) the ordinance did not effect an unconstitutional taking; (3) the daily fines did not constitute an unconstitutional deprivation of civil rights; (4) the penalties imposed did not exceed the City’s statutory authority; (5) TMC 2.01.060 does not violate constitutional protections

against double jeopardy; and (6) Post failed to comply with the Land Use Petition Act's (LUPA) procedural requirements. Post appeals, assigning error to each of the trial court's findings. Post's claim is barred by his failure to comply with LUPA's procedural requirements, and we need not address his other arguments. We affirm.

FACTS

I. TACOMA MINIMUM BUILDING AND STRUCTURES CODE ENFORCEMENT SCHEME

Chapter 2.01 Tacoma Municipal Code sets out the minimum standards for properties within City limits. TMC 2.01.030. Under the rules in this chapter, structures with specified problems accumulate points depending on the type of violation. TMC 2.01.060(B). Once a property has accumulated 50 points, it is classified as substandard. TMC 2.01.060(C); (D)(4)(a). If the building is substandard and has more serious problems, such as a lack of adequate ventilation, cracked foundation, inadequate electrical wiring or plumbing, or hazardous mechanical equipment, it will be classified as derelict. TMC 2.01.060(E)(1).

When a property has been evaluated and classified as substandard, Tacoma's code requires that the owner be notified of the violations and the appropriate actions to mitigate those violations. TMC 2.01.060(D)(4)(a). At that point, the owner has 30 days to respond to the letter and negotiate a schedule for correcting the violations. TMC 2.01.060(D)(4)(a). If the owner does not respond, the City will assess penalties ("intended to be only for remedial purposes") and send another letter notifying the owner of those penalties. TMC 2.01.060(D)(4)(b). Again, the owner is given 30 days to respond and negotiate a schedule to correct the violations. TMC 2.01.060(D)(4)(b). If the owner fails to respond, a second penalty is assessed and a third letter is sent to the owner. TMC 2.01.060(D)(4)(c). At this point, the owner has 14 days to respond and

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negotiate a schedule to correct the violations. TMC 2.01.060(D)(4)(c). Additional civil penalties may be assessed if the owner still fails to respond, and the City will send another letter to the owner describing those penalties. TMC 2.01.060(D)(4)(d). The owner has 7 days to respond to this fourth letter, and if *again* the owner fails to respond, the City will assess a civil penalty for every calendar day the owner does not respond. TMC 2.01.060(D)(4)(d) - (f). When the owner fails to respond and penalties accumulate in excess of \$1,000, the City will file a complaint with the Pierce County Auditor, to be attached to the property's title. TMC 2.01.060(D)(4)(f). A copy of the complaint is sent to the property owner and all tenants. TMC 2.01.060(D)(4)(f). "Once an enforcement action is undertaken, it shall be continued until all outstanding violations have been corrected." TMC 2.01.060(D)(5).

An owner may request administrative review of a notice of violation or civil penalty by filing a written request within 30 days of the notification date. TMC 2.01.060(D)(6)(b). The Building Official will review the information provided and determine whether a violation occurred, and he will accordingly affirm, vacate, suspend, or modify the notice of violation or penalty assessed. TMC 2.01.060(D)(6)(c). Either party may file an appeal with the Hearing Examiner within 30 days of receiving the Building Official's decision. TMC 2.01.060(D)(7). The Hearing Examiner will set a hearing and issue findings of fact and conclusions of law. TMC 2.01.060(D)(7).

The procedure for derelict buildings is slightly different. TMC 2.01.060(E). Derelict buildings are not to be occupied for any purpose until the owner has made repairs that eliminate the violations. TMC 2.01.060(E)(2). The owner must secure the building within 10 days of receiving the notice of violation. TMC 2.01.060(E)(3)(a). Additionally, the owner will receive

only one notice of violation before civil penalties are assessed. TMC 2.01.060(E)(3)(b). The procedure for appeals to the Building Official and Hearing Examiner is the same as those for substandard buildings. TMC 2.01.060(E)(5) - (6).

II. POST'S VIOLATIONS AND PROCEDURAL HISTORY

Post owns approximately 41 properties in Pierce County, with an assessed value of over \$5.2 million. Since 1999, the City of Tacoma has had nuisance, substandard, and derelict building cases on as many as 24 of Post's properties. The City sent notices of violation for 22 properties in violation of the minimum standard, describing the violations and advising Post how to seek administrative review. Post did not respond to six of the initial notices, but agreed to a work schedule for the others. Post failed to comply with the schedules, and the City first issued penalties on the substandard properties in the amount of \$125 per property.

Post failed to timely appeal (in superior court) the notices of violation or the first penalty assessment for all properties except one.¹ The State points out that Post appealed on one property, but both the Hearing Examiner and the superior court affirmed the City's penalties. Post did not appeal the superior court ruling.

The City continued to inspect the properties and assess fines for those properties not in compliance. The City did not issue any new violations; all penalties imposed were directly related to the original violations.

¹ Post did appeal three other notices of violation and penalties to the Building Official who affirmed the City each time.

The City imposed second, third, and fourth penalties according to TMC 2.01.060, and it then imposed penalties on consecutive work days. The City ultimately imposed penalties between \$2,125 and \$79,000 per property, depending on the extent of the violations.

By July 2005, Post owed the City \$117,500 in penalties and \$265,000 to the City's collection agency, and he still had 17 open cases against him. According to an affidavit from the City's collection agency, Post agreed to pay \$50,000 monthly installments in September 2004, but he failed to follow through, and instead paid only a total of \$140,000.²

Post sued the City in Pierce County Superior Court in March 2005. He filed an amended complaint in December 2005, requesting (1) an injunction to prohibit the City from attempting to collect the fines, (2) a declaratory judgment stating that TMC 2.01.060 affected an unconstitutional taking, and (3) damages for violations of the state and federal constitutions, as well as violations of his civil rights, breach of contract, and double jeopardy. The City counterclaimed to recover the \$411,712.11 Post still owed.

Following an April 2006 hearing, the trial court granted summary judgment to the City. The trial court held that (1) the City's fines were not abusive and excessive in violation of state and federal constitutions; (2) the ordinance did not effect an unconstitutional taking; (3) the daily fines did not constitute an unconstitutional deprivation of civil rights under 42 U.S.C. § 1983; (4) the penalties imposed by TMC 2.01.060 do not exceed the authority granted under RCW 7.80.010 et seq; (5) TMC 2.01.060 does not violate constitutional protections against double jeopardy; and (6) Post did not comply with LUPA (chapter 36.70C RCW) when he failed to file

² Post claims that he has paid approximately \$300,000 in fines, but the pages he cites do not support this contention. We will not sift through the record to find support for an argument.

his complaint within 21 days of the issuance of the penalty assessment. Accordingly, the trial court dismissed the entirety of Post's complaint, and Post now appeals.³

ANALYSIS

Summary judgment is rendered where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). When reviewing an order for summary judgment, we engage in the same inquiry as the trial court. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003). We review questions of law de novo. *James v. Kitsap County*, 154 Wn.2d 574, 580, 115 P.3d 286 (2005).

I. LUPA REQUIREMENTS

Post argues that the procedural requirements of LUPA do not apply in this case. Specifically, he claims that it is not applicable because (1) he originally sought monetary damages, and monetary damages are excluded under RCW 36.70C.030(1)(c); (2) the City has not claimed LUPA as authority for imposition of fines; (3) LUPA does not apply to interlocutory decisions; and (4) the City Hearing Examiner is a court of limited jurisdiction and "thus exempt from LUPA." Appellant's Br. at 35-39.

The City responds that Post's failure to comply with the jurisdictional requirements of LUPA bars all his claims. Specifically, the City contends that (1) the Hearing Examiner's final determination to impose penalties was a land use decision subject to LUPA, (2) Post failed to seek judicial review within LUPA's 21 day filing requirement, (3) Post's initial request for

³ The City correctly points out that Post, in violation of RAP 10.3(a)(4), inserted several arguments into his statement of the case, including assertions that the inspectors were aggressive, the system of fining is arbitrary, and that he was "at the mercy of the individual inspectors." Resp't Br. at 4; Appellant's Br. at 11.

damages does not render LUPA inapplicable, (4) the Hearing Examiner is not a “court of limited jurisdiction,” and (5) the notices of penalties were final determinations subject to LUPA. Resp’t Br. at 13-19. The City’s arguments are persuasive.

LUPA is the exclusive means for judicial review of land use decisions made by a local jurisdiction. RCW 36.70C.040. However, a decision will not be reviewable under LUPA if the local jurisdiction is required to enforce the ordinances in a court of limited jurisdiction. RCW 36.70C.020(1)(c).

The first issue is whether the City’s imposition of fines is a “land use decision” subject to the procedural requirements of LUPA. LUPA defines “land use decision” to include “enforcement by a local jurisdiction of ordinances regulating the . . . maintenance, or use of real property.” RCW 36.70C.020(1)(c). Here, the City imposed fines on Post’s properties in order to enforce ordinances regulating the maintenance and use of real property. Therefore, the City’s imposition of fines fits squarely within the statutory definition of “land use decision.” In a somewhat analogous situation, where a municipal jurisdiction imposed a fee as a condition to issuing a building permit, the Washington Supreme Court recently held the decision to impose the fee was a “land use decision” within the meaning of LUPA (chapter 36.70C RCW) and therefore subject to its procedural requirements. *James*, 154 Wn.2d at 586. Additionally, Division Three recently held that a city’s notice of violation to a party whose structural addition violated city ordinances was a land use decision subject to LUPA. *Richards v. City of Pullman*, 134 Wn. App. 876, 881, 142 P.3d 1121 (2006). LUPA’s broad definition of “land use decision” clearly encompasses the City’s decision to fine Post.

Next, we must examine whether the City's notice of violation and penalties were final determinations. Under LUPA, a land use decision must be a "final determination by a . . . officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020(1). Post seems to imply that the notices of violation and penalties were interim decisions. The City disagrees, pointing out that, under the penalty scheme set out in TCM 2.01.060, the Hearing Examiner's decisions are final unless they are appealed. The City's argument is persuasive — under Tacoma's enforcement scheme (see above), the Hearing Examiner is the officer with the highest level of authority to make the determination. Therefore, his decisions are final and within LUPA's jurisdiction.⁴

Next, we consider whether the City was required to enforce the ordinance in a court of limited jurisdiction. *See* RCW 36.70C.020(1)(c). Here, Post contends that the City's Hearing Examiner is such a court, but the City disagrees. The City is correct. First, Post offers no legal authority for his argument. We will not consider an issue that is insufficiently briefed or unsupported by legal authority. RAP 10.3(a)(5). Even if the court were to consider this argument, it fails. A court of limited jurisdiction is any court organized under Titles 3, 35, or 35A RCW. RCW 3.02.010. The Hearing Examiner is not a court organized under any of those titles, and is therefore not a court of limited jurisdiction.

⁴ In his reply, Post claims that the City admits that the notice of daily penalties "was not appealable to the hearings examiner." Reply Br. at 5. However, he offers no citation to support this. He also offers no authority for the contention that "[t]here is no question the [City] claims there is no appeal to the hearings examiner and therefore no decision may be made by the hearings examiner." Reply Br. at 6.

A more troublesome issue, not initially briefed by the parties, is the effect of RCW 3.46.030, which by its terms appears to grant exclusive jurisdiction to claims arising under City of Tacoma ordinances to the Tacoma Municipal Court. RCW 3.46.030; *see City of Spokane v. Spokane County*, 158 Wn.2d 661, 681-83, 146 P.3d 893 (2006).

When interpreting a similar statute, RCW 35.20.030, the Washington Supreme Court held that the superior court had jurisdiction to hear a case where it was alleged that the City of Seattle was enforcing municipal traffic ordinances in violation of state law and state and federal constitutional protections. *Orwick v. City of Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984). “[A] municipal court does not have exclusive original jurisdiction merely because the factual basis for a claim is related to enforcement of a municipal ordinance. The relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought.” *Orwick*, 103 Wn.2d at 252.

Here, Post raises some claims, such as the amount of his fines, that may be subject to the exclusive jurisdiction of the municipal court. However, he also raises claims based on the state and federal constitutions. Under *Orwick*, these claims were subject to superior court jurisdiction.⁵ Thus, the municipal court did not have exclusive jurisdiction over Post’s claims; LUPA’s exception does not apply because the City was not required to enforce the fines in a court of limited jurisdiction.

Finally, we consider whether Post’s initial request for monetary damages bars LUPA’s application in this case. RCW 36.70C.030(1)(c) provides that LUPA is not applicable to

⁵ Even if, as Post contends, the nature of his claims mandates exclusive jurisdiction to municipal court, his complaint was therefore filed in the incorrect court and would have to be dismissed.

“[c]laims provided by any law for monetary damages or compensation.” Here, Post did originally include a request for damages in his complaint, but he concedes that “the cause for money damages was dismissed without prejudice.” Clerk’s Papers (CP) at 298-300; Appellant’s Br. at 35.⁶ The trial court’s final order also indicates that all claims for damages were previously dismissed. Post has not appealed the dismissal of these claims, so they are not before us on review. *See* RAP 10.3(a)(4). The only claims relevant to the trial court’s order (and this appeal) are Post’s claims for injunctive and declaratory relief; LUPA is not barred.

LUPA is the exclusive means of judicial review of land use decisions, with certain enumerated exceptions. *James*, 154 Wn.2d at 583; RCW 36.70C.030(1). Because (1) the City’s imposition of fines was a final land use decision, and (2) Post has not established that any of the exceptions apply in this case, any appeal of the land use decision must comply with LUPA’s procedural requirements.

Judicial review under LUPA is commenced by filing a land use petition in superior court within 21 days of the land use decision, and a land use petition is barred unless it is timely served and filed. RCW 36.70C.040(2) - (3). In order to have standing to bring a land use petition under LUPA, the petitioner must have exhausted his administrative remedies. RCW 36.70C.060(2)(d). In this case, Post did not file a land use petition within 21 days, nor did he exhaust his

⁶ Post also indicates that there are no claims for damages before us later in his brief, where he states, “[t]he case at hand asks the court for a declaratory judgment that TMC 2.01.060 is invalid and an injunction from future enforcement of the ordinance.” Appellant’s Br. at 37.

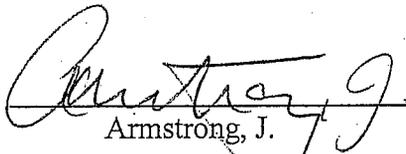
administrative remedies available under TMC 2.01.060. His claims are therefore barred, and we affirm the trial court's grant of summary judgment to the City.⁷

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

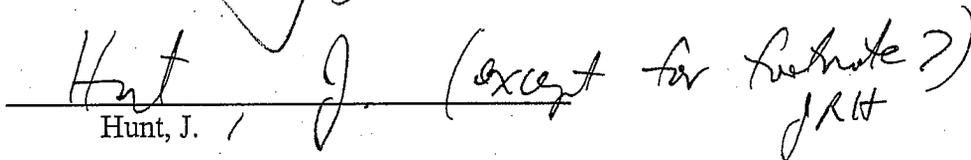


Penoyar, J.

We concur:



Armstrong, J.



Hunt, J.

⁷ We are concerned that arbitrary and capricious action could be taken under TMC 2.01.060(D)(4)(e)-(f) and (5), which indicate that fines "may" be assessed every calendar day and that enforcement action continues until *all* outstanding violations have been corrected. For a property owner who has repaired most or nearly all of the reported deficiencies, it could be unreasonable to continue to impose the same amount of fine as initially imposed. Nevertheless, this is an issue that Post could have raised in the administrative process or through a timely filed LUPA petition.

APPENDIX 2

C. "Faced wall" is a wall in which the masonry facing and backing are so bonded as to exert a common action under load.

D. "Nonbearing wall" is any wall that is not a bearing wall.

E. "Parapet wall" is that part of any wall entirely above the roof line.

F. "Retaining wall" is a wall designed to resist the lateral displacement of soil or other materials.

"Water closet" is a flushable plumbing fixture connected to running water and a drainage system and used for the disposal of human waste.

"Water closet compartment" is a room containing only a toilet or only a toilet and lavatory.

"Window" shall mean a glazed opening, including glazed doors, which open upon a yard, court, or a vent shaft open and unobstructed to the sky.

"Window well" is a soil-retaining structure at a window having a sill height lower than the adjacent ground elevation.

"Workmanship" is the quality or mode of execution for building construction normal to the building industry trades.

"Yard" is an open, unoccupied space other than a court, unobstructed from the ground to the sky, except where specifically provided by this chapter, on the lot on which a building is situated. (Ord. 26715 § 2; passed Oct. 17, 2000 Ord. 26380 § 1; passed Mar. 16, 1999; Ord. 24503 § 1; passed Dec. 12, 1989; Ord. 19217 § 1; passed Oct. 13, 1970; Ord. 16384 § 4; passed Jun. 29, 1959; Ord. 15742 §§ 1-13; passed Nov. 13, 1956)

2.01.060 Administration and Process.

A. Initial Filing of Complaint.

An initial enforcement determination shall be undertaken against buildings or properties, whenever:

1. The Building Official, the Public Works Director, the Director of the Tacoma-Pierce County Health Department, the Police Chief, or the Fire Chief, or their duly authorized representatives, have reason to believe that a violation of this Code exists.

2. A complaint is filed with the City of Tacoma Building and Land Use Services Division by any person, provided that where complaints have been filed by tenants, that the tenant first exhaust all remedies provided through the Washington State Landlord

Tenant Act. Complaints may be received either verbally or in writing.

B. Inspection and Evaluation of Buildings and Property.

When a complaint has been filed, or there are other reasons pursuant to normal enforcement of the Tacoma Municipal Code, the Building Official shall inspect the building and property. Based on the inspection, the Building Official shall then determine whether the building and/or property is in violation of this chapter and the degree of violation. All properties where an evaluation inspection is performed shall be evaluated against the standards of "Substandard Property" listed in Table B, "Fire and Life Safety Hazards" listed in Table C, "Derelict Buildings or Structures" listed in Table D, and "Dangerous Buildings or Structures" listed in Table E. Substandard Properties shall be assigned violation points, in accordance with Table B and Table C, and the provisions of Subsection C, Violation Tables. In addition, violations listed in Table C, "Fire and Life Safety Hazards," shall be referred to the Building Official, the Fire Chief, and/or the Electrical Inspection Manager, as appropriate, for evaluation as to whether immediate action is necessary. The standards against which properties shall be evaluated are set forth in Section 2.01.070, Minimum Building Requirements.

C. Violation Tables.

During the evaluation inspection, and any subsequent inspections of the building and property, the Building Official shall note each violation and evaluate the property in accordance with Table B, Table C, Table D, and Table E. Once all violations are listed, and if it is determined that the property is substandard, the points, as listed in Table B and Table C, for each violation listed against the property, shall be totaled to determine the degree of violation. The course or action shall be in accordance with Table A.

Where a building or structure contains violations listed in Table D, Derelict Buildings or Structures, the building or structure shall be declared a Derelict Building or Structure and processed according to the procedures set forth in Subsection E, Derelict Buildings or Structures Procedures.

Where a building or structure contains violations listed in Table E, Dangerous Buildings or Structures, that building or structure shall be declared a Dangerous Building or Structure and processed according to the procedures set forth in Subsection F, Dangerous Buildings or Structures Procedures.

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Groups of buildings on the same property may be processed under a single complaint process.

D. Substandard Property Procedures.

1. General. Where all violations are unrelated to the buildings and structures on the property, the complaint against the property shall be processed under the applicable provisions of the Tacoma Municipal Code.

2. Standard Property. Property which has been inspected and evaluated, and which received 24 or less violation points, shall be considered standard property and in compliance with this chapter, and no action shall be taken. The complaint shall be closed and all accumulated documentation filed.

3. Non-Standard Property Warning. The owner of property which, by an external inspection, is evaluated as being maintained in a substandard condition and receives 25 to 49 violation points, shall be considered non-standard property and sent a letter describing the substandard conditions and the appropriate actions for mitigating these conditions. The owner shall be advised, in writing, that the property is in a declining state, and that if conditions worsen, more formal mitigating actions will be undertaken. Once the advisory letter is sent, the complaint shall be closed and all accumulated documentation filed. The property shall be reinspected one year from the date of the letter and the property shall be reevaluated to determine whether additional enforcement procedures need to be taken.

4. Substandard Property Notification and Penalties.

a. When any property has been evaluated, by inspection, as being "Substandard Property" and receives 50 or more violation points, the owner shall be notified by letter, sent by both first-class mail and by certified mail, return receipt requested, describing the violations and the appropriate actions for mitigating these violations. The owner shall be given 30 calendar days from the receipt of the letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

b. In the event a valid response is not received in the allotted time, a civil penalty or penalties, in accordance with the first penalty assessment in Table F, shall be assessed. These penalties are intended to be only for remedial purposes. A new letter, stating the assessment of penalties, shall be sent in accordance with the procedures set forth above. The owner shall be given 30 calendar days from the receipt of the second letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services

Division for correcting the violations to the satisfaction of the Building Official.

c. In the event a valid response is not received in the allotted time, an additional civil penalty or penalties, in accordance with the second penalty assessment in Table F, shall be assessed. A new letter, stating the additional assessments of penalties, shall be sent in accordance with the procedures set forth above. The owner shall be given 14 calendar days from the receipt of the third letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

d. In the event a valid response is not received in the allotted time, an additional civil penalty or penalties, in accordance with the third penalty assessment in Table F, shall be assessed. A new letter, stating the additional assessments of penalties, shall be sent in accordance with the procedures set forth above. The owner shall be given 7 calendar days from the receipt of the fourth letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

e. In the event a valid response is not received in the allotted time or the agreed-upon schedule has been violated, an additional civil penalty or penalties, in accordance with the Fourth Penalty and Subsequent Assessments in Table F, shall be assessed. A new letter, stating the additional assessments of penalties, shall be sent in accordance with the procedures set forth above. The owner may be assessed a civil penalty every calendar day commencing with the fifth civil penalty issued for failure to respond to the letters, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

f. The process described in Subsection (e) above shall be repeated on a regular schedule and may be assessed every calendar day until such time as there is a valid response, each time assessing penalties in accordance with the Fourth Penalty and Subsequent Assessments in Table F. In the event that no response is received, and penalties have accumulated in excess of \$1,000.00, the City shall file a Certificate of Complaint with the Pierce County Auditor, to be attached to the title of the property. A copy of the Certificate of Complaint shall be sent to the property owner, and all tenants, if different from the owner.

g. Penalties shall be billed to the owner. Penalties unpaid after 60 calendar days shall be referred to a

collection agency, approved by the City of Tacoma, for collection.

5. Reinspection and Penalties. Once a valid response is received and a schedule is set, the property shall be reinspected in accordance with the agreed-upon schedule, or every 90 calendar days, to assess that progress is being made in correcting the violations and adhering to the agreed upon schedule. If progress, in accordance to the schedule, is not being made to the satisfaction of the Building Official, penalties shall be assigned, in accordance with Table F, based on the number of previous penalties that have been assessed while waiting for a valid response. At each inspection of the property, the number of violations shall be reassessed and the status of the action shall either remain in the present category or shifted to either the Derelict or Dangerous Buildings or Structures categories based on whether any of the violations are listed in Table D, Derelict Buildings or Structures, or Table E, Dangerous Buildings or Structures. Once an enforcement action is undertaken, it shall be continued until all outstanding violations have been corrected.

Once the building, structure, and property violations have been corrected, the case shall be closed and, if appropriate, a final report relative to the action placed in the City's files, and any Certificates of Complaint filed with the Pierce County Auditor against the title of the property, shall be removed by the City on payment of any assessed penalties and any costs incurred by the City for securing the property.

6. Review by the Building Official.

a. General. A person, firm, or corporation to whom a Notice of Violation for a Substandard Building(s), or a civil penalty, pursuant thereof, may request an administrative review of the Notice of Violation for a Substandard Building(s) or for the first civil penalty assessed pursuant to enforcement.

b. How to Request Administrative Review. A person, firm, or corporation may request an administrative review by the Building Official of the Notice of Violation for a Substandard Building(s) or the first civil penalty assessed, by filing a written request with the Building and Land Use Services Division of the Department of Public Works within 30 calendar days of the first notification date of violations or the notification date of the first assessed penalty. The request shall state in writing the reasons the Building Official should review the Notice of Violation or the issuance of the civil penalty. Failure to state the basis for the review in writing shall be cause for dismissal of the review. Upon receipt of the request for

administrative review, the Building Official shall review the information provided.

c. Decision of Building Official. After considering all of the information provided, including information from the code enforcement officer and the City Attorney, or his/her designee, the Building Official shall determine whether a violation has occurred, and shall affirm, vacate, suspend, or modify the Notice of Violation for the Substandard Building(s) or the amount of any monetary penalty assessed. The Building Official's decision shall be delivered in writing to the appellant by first-class mail and by certified mail, return receipt requested.

7. Appeals to the Hearing Examiner. Appeals of the Decision resulting from the Building Official's Review shall be made to the Hearing Examiner within 30 calendar days of the receipt of the Building Official's Decision. The Hearing Examiner, upon receipt of a properly filed appeal, shall set a hearing date, and the appellant shall be notified of the hearing date by first-class mail and by certified mail, return receipt requested. Proceedings in regard to appeals filed under this section shall be conducted in accordance with the requirements of Tacoma Municipal Code 1.23 and Office of the Hearing Examiner Rules of Procedure for Hearings. The Hearing Examiner shall issue Findings of Fact and Order, based on the hearing, in writing, delivered to the appellant by first-class mail and by certified mail, return receipt requested.

E. Derelict Buildings or Structures Procedures.

1. General. This section shall apply to all buildings, structures, and properties, residential or commercial, which have been evaluated as being Derelict Buildings or Structures, in that the building or structure contains one or more violations listed in Table D, Derelict Buildings or Structures. By definition, Derelict Buildings or Structures are unfit for human occupancy.

2. Posting and Placement of Utility Restraint. Derelict Buildings or Structures shall be posted "MUST NOT BE OCCUPIED." See Subsection G, Posting of Buildings. Simultaneously, utility restraints shall be placed on such buildings or structures. See Subsection H, Utility Restraints.

Buildings, which are posted, shall not be occupied for any purpose until repaired to eliminate the violations listed in the Notice of Violation, to the satisfaction of the Building Official. In addition, the building shall only be authorized to be entered for preparing a time schedule and a repair plan to be submitted to the Building and Land Use Services Division for approval. Upon approval of the time schedule and repair plan,

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the owner or his/her representatives will be authorized to enter the building to effect repairs. No other entry or occupancy of the building shall be permitted until the repairs are completed and approved by the Building Official.

3. Owner Notification and Penalties.

a. The owner shall be notified that the building, structure, or property has been found to be in violation of this chapter and is Derelict. The owner shall be given 10 calendar days from the receipt of the notice to secure the building, in accordance with Section 2.01.090, Unoccupied or Vacant Building Standards. The notice shall include the standards for securing an unoccupied or vacant building. The owner shall be given 30 calendar days from the receipt of the notice to respond to the Building Official to negotiate a plan of action. In addition, such notification will state that either an Eminent Domain Condemnation proceedings or a Dangerous Building proceedings may be initiated if there is not a workable plan and schedule submitted or substantial improvement of the property does not occur in substantial compliance with the agreed upon plan and schedule. Such proceedings may result in the loss of the building(s) and property or the demolition of the building(s).

b. In the event a valid response is not received in the allotted time, a civil penalty or penalties, in accordance with the first penalty assessment in Table F, shall be assessed. These penalties are intended to be only for remedial purposes. A new letter, stating the assessment of penalties, shall be sent in accordance with the procedures set forth above. The owner shall be given 30 calendar days from the receipt of the second letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

c. In the event a valid response is not received in the allotted time, an additional civil penalty or penalties, in accordance with the second penalty assessment in Table F, shall be assessed. A new letter, stating the additional assessments of penalties, shall be sent, in accordance with the procedures set forth above. The owner shall be given 14 calendar days from the receipt of the third letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

d. In the event a valid response is not received in the allotted time, an additional civil penalty or penalties, in accordance with the third penalty assessment in Table F, shall be assessed. A new letter, stating the

additional assessments of penalties, shall be sent in accordance with the procedures set forth above. The owner shall be given 7 calendar days from the receipt of the fourth letter to respond to the letter, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

e. In the event a valid response is not received in the allotted time or the agreed-upon schedule has been violated, an additional civil penalty or penalties, in accordance with the Fourth Penalty and Subsequent Assessments in Table F, shall be assessed. A new letter, stating the additional assessments of penalties, shall be sent in accordance with the procedures set forth above. The owner may be assessed a civil penalty every calendar day, commencing with the fifth civil penalty issued for failure to respond to the letters, and to negotiate a schedule with the Building and Land Use Services Division for correcting the violations to the satisfaction of the Building Official.

f. The process described in Subsection (e) above shall be repeated on a regular schedule and may be assessed every calendar day until such time as there is a valid response, each time assessing penalties in accordance with the Fourth Penalty and Subsequent Assessments in Table F. In the event that no response is received and penalties have accumulated in excess of \$1,000.00, the City shall file a Certificate of Complaint with the Pierce County Auditor to be attached to the title of the property. A copy of the Certificate of Complaint shall be sent to the property owner and all tenants, if different from the owner.

g. Penalties shall be billed to the owner. Penalties unpaid after 60 calendar days shall be referred to a collection agency, approved by the City of Tacoma, for collection.

4. Response to Notification. The response to the City shall be the development of a written schedule for repairing the building, jointly agreed upon by the owner and the City. The schedule shall include:

a. Time for developing and submitting acceptable construction plans, specifications, and calculations for the repair of the building or structure, in accordance with the provisions of Subsection 7, Buildings Declared Derelict.

b. Time for actually repairing the building or structure once a building permit has been issued. Such time line may include intermediate progress goals, as appropriate.

Once an acceptable schedule has been determined and agreed to, construction plans, specifications, and

calculations for the repair of the building or structure shall be developed and submitted to the City for approval with the time limits set by the schedule. Once the plans and specifications have been approved for permit, the permit shall be obtained within 14 calendar days of notification that the permit is ready. The work authorized by the permit shall proceed according to a schedule jointly agreed upon by the owner and the City, verified by inspection. Such schedule shall comply with the Building Code provisions governing the expiration of permits.

EXCEPTIONS:

1. The Building Official may agree, for sufficient reason, to accept an alternate time schedule for the repair of the building.
2. The Building Official may grant extensions to the time schedule for sufficient reasons on written request. Such requests must be filed with the Building Official prior to the deadlines set for the completion of the construction.

If, in the event, after the initial contact, any of the following occur:

- a. the owner and the City cannot agree upon a schedule, or
- b. the owner does not submit plans and specifications for approval, according to the schedule, for the repair of the building, or
- c. the owner fails to obtain the permits in a timely manner when they are ready to be issued, or
- d. the owner fails to start repairs, or
- e. the owner, once having started repairs, fails to meet intermediate progress goals; the Building and Land Use Services Division shall notify the owner of non-compliance, by first-class mail and by certified mail, return receipt requested, and assess penalties in accordance with Table F. This procedure shall be repeated in accordance with Subsection 3 above (Owner Notification and Penalties) until progress, satisfactory to the Building Official, is made. In the event that the owner does not respond to the notices and penalties have accumulated in excess of \$1,000.00, the City shall file a Certificate of Complaint with the Pierce County Auditor to be attached to the title of the property. A copy of the Certificate of Complaint shall be sent to the property owner and all tenants, if different from the owner.

At each inspection of the property, the violations shall be reassessed and the status of the action shall either remain in the present category or shifted to the Dangerous Building category of enforcement if

violations listed in Table E, Dangerous Buildings or Structures, are present. Once an enforcement action is undertaken, it shall be continued until all outstanding violations have been corrected.

Once the building, structure, and property violations have been corrected to the satisfaction of the Building Official, the case shall be closed and, if appropriate, a final report relative to the action placed in the City's files, and any Certificates of Complaint filed with the Pierce County Auditor against the title of the property shall be removed by the City on payment of any assessed penalties and any costs incurred by the City for securing the property.

5. Reviews by the Building Official.

a. General. A person, firm, or corporation to whom a Notice of Violation for a Derelict Building(s), or a civil penalty, pursuant thereof, may request an administrative review of the Notice of Violation for a Derelict Building(s) or for the first civil penalty assessed pursuant to enforcement.

b. How to Request Administrative Review. A person, firm, or corporation may request an administrative review by the Building Official of the Notice of Violation for a Derelict Building(s) or the first civil penalty assessed, by filing a written request with the Building and Land Use Services Division of the Department of Public Works within 30 calendar days of the first notification date of violations or the notification date of the first assessed penalty. The request shall state in writing the reasons the Building Official should review the Notice of Violation or the issuance of the civil penalty. Failure to state the basis for the review in writing shall be cause for dismissal of the review. Upon receipt of the request for administrative review, the Building Official shall review the information provided.

c. Decision of Building Official. After considering all of the information provided, including information from the code enforcement officer and the City Attorney, or his/her designee, the Building Official shall determine whether a violation has occurred, and shall affirm, vacate, suspend, or modify the Notice of Violation for the Derelict Building(s) or the amount of any monetary penalty assessed. The Building Official's decision shall be delivered in writing to the appellant by first-class mail and by certified mail, return receipt requested.

6. Appeals of the Decision of the Building Official to Hearing Examiner.

Appeals of the Decision resulting from the Building Official's Review shall be made to the Hearing

Tacoma Municipal Code

Examiner within 30 calendar days of the receipt of the Building Official's Decision. The Hearing Examiner, upon receipt of a properly filed appeal, shall set a hearing date, and the appellant shall be notified of the hearing date by first-class mail and by certified mail, return receipt requested. Proceedings in regard to appeals filed under this section shall be conducted in accordance with the requirements of Tacoma Municipal Code 1.23 and Office of the Hearing Examiner Rules of Procedure for Hearings. The Hearing Examiner shall issue Findings of Fact and Order, based on the hearing, in writing, delivered to the appellant by first-class mail and by certified mail, return receipt requested.

7. Buildings Declared Derelict. When a building or structure, or any aspect of a building or structure, is Derelict and Substandard by the definitions set forth in Section 2.01.050, Table B, Table C, and Table D of this chapter, those aspects which were declared Derelict and Substandard shall be repaired to the minimum building requirements set forth in Section 2.01.070, and the minimum standards of repair set forth in Section 2.01.080 of this chapter, as directed by the Building Official.

8. Alternate Procedures. Where Derelict Building Proceedings undertaken against a property have extended over a period of time to where it is necessary to file a Certificate of Complaint with the Pierce County Auditor, the Building Official may undertake one of the two following procedures to mitigate the Derelict Status of the Building:

a. Procure the Property through Eminent Domain: Where the property undergoing the Derelict Building Procedure is of sufficient value to be repairable, the Building Official may obtain the property through eminent domain, pursuant to the provisions of the Revised Code of Washington (RCW) 35.80A.

b. Start Dangerous Building Proceedings: Where the property undergoing the Derelict Building Procedure is in a state where it is more economical to demolish the building(s) on the property, the Building Official may initiate Dangerous Building Proceedings pursuant to Tacoma Municipal Code 2.01.060.F and Table E of this chapter.

F. Dangerous Buildings or Structures Procedures.

1. General. This section shall apply to all buildings, structures, and properties, residential or commercial, which have been evaluated as being Dangerous Buildings and Structures in that the building or structure contains one or more violations listed in Table E, Dangerous Buildings or Structures. Dangerous Buildings or Structures, by definition, are

unfit for human occupancy, are potentially dangerous to life and limb, and/or are in a condition where it is unfeasible to repair.

2. Posting and Placement of Utility Restraint.

Dangerous buildings or structures shall be posted "MUST NOT BE OCCUPIED." See Subsection G, Posting of Buildings. Simultaneously, utility restraints shall be placed on such buildings or structures. See Subsection H, Utility Restraints.

Buildings, which are posted, shall not be occupied for any purpose until repaired to eliminate the violations listed in the Notice of Violation, to the satisfaction of the Building Official. In addition, the building shall only be authorized to be entered for preparing a time schedule and a repair plan to be submitted to the Building and Land Use Services Division for approval. Upon approval of the time schedule and repair plan, the owner or his/her representatives will be authorized to enter the building to effect repairs. No other entry or occupancy of the building shall be permitted until the repairs are completed and approved by the Building Official.

3. Owner Notification. The owner shall be notified that the building, structure, or property has been found to be in violation of this chapter and is dangerous. The owner shall be given 10 calendar days from the receipt of the notice to secure the building, in accordance with Section 2.01.090, Unoccupied or Vacant Building Standards. The notice shall include the standards for securing a vacant building. The owner shall be given 30 calendar days from the receipt of the notice to respond to the Building Official to negotiate a plan of action.

EXCEPTION: Where there is an imminent danger to life or property, the building can be secured by the order of the Building Official, Police Chief, Fire Chief, or Director of the Tacoma-Pierce County Health Department, and the cost assessed to the owner in accordance with the provisions of RCW 35.80.030(h).

The response to the City shall be a written plan for repairing or demolishing the building. The written response shall include a schedule, jointly agreed upon by the owner and the City, for the repair or demolition of the building or structure. The schedule shall include:

a. Time for developing and submitting acceptable construction plans, specifications, and calculations for the repair or demolition of the building or structure.

b. Time for actually repairing or demolishing the building or structure once a building permit has been

APPENDIX 3

The Constitution of the United States of America

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 4

The Constitution of the United States of America

Amendment VIII

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

APPENDIX 5

ARTICLE I
DECLARATION OF RIGHTS

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

APPENDIX 6

ARTICLE I
DECLARATION OF RIGHTS.

SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

APPENDIX 7

ARTICLE XI
COUNTY, CITY, AND TOWNSHIP ORGANIZATION

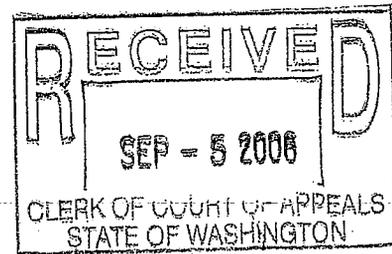
SECTION 11 POLICE AND SANITARY REGULATIONS. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

APPENDIX 8

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SEP 05 2006

TACOMA CITY ATTORNEY
CIVIL DIVISION



NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST

Appellant,

v.

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

Respondents.

APPELLANT'S BRIEF

EVERETT HOLUM, P.S.
Attorneys for Plaintiffs/Appellants
Everett Holum
WSB #700
633 North Mildred Street, Suite G
Tacoma, WA 98406

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

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

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

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

APPENDIX 9

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NO. 34808-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

PAUL W. POST, *Appellant*

v

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

RESPONDENTS' RESPONSE BRIEF

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Attorney for Respondent City of Tacoma

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WSB #26354

11-22-06 F1

the property owner he or she may appeal the fine or assessment of the condition of the property within 30 days.” Brief of Appellant at 6.

TMC 2.01.060 clearly permits a property owner to appeal the initial notice of violation or the first penalty. Because any and all of subsequent penalties here directly related only to those violations cited in the original notice of violation and first penalty, Post could not appeal the subsequent penalties. See TMC 2.01.060.D.6.b and E.5.b. To allow a property owner to appeal each subsequent penalty—which are based only on the original violations—would essentially permit them to re-litigate the same underlying violation indefinitely.

The notices clearly provided Post with details of the violations. The City also specifically told Post how he could appeal the notices of violation or the first penalty. Post just generally chose to ignore the letters. Thus, Post cannot prove the City violated his rights to due process.

b. The Superior Court also correctly held that the City did not violate Post’s substantive due process rights.

The Court should not address Post’s substantive due process claim because he specifically relies on another explicit constitutional provision,

APPENDIX 10

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CIVIL DIVISION

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JAN 16 2007

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 34808-0-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST

Appellant,

v.

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

Respondents.

APPELLANT'S REPLY BRIEF

COPY

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Tacoma, WA 98406

COPY TO
CLIENT 1-17-07 ~~HA~~

2 Although the City raised a defense of exhaustion of remedies in its original answer and first amended answer, the application of LUPA as a defense was not considered until its second amended answer filed January 10, 2006. Also the City's original motion for summary judgment filed January 16, 2005, did not raise the time limits imposed by LUPA. The City abandoned the standard exhaustion of remedies defense in favor of the LUPA timelines in its second motion for summary judgment.

both the findings and the fine within 30 days. TMC 2.01.060. Strangely, LUPA allows appeals within 14 days following notice of a determination having been made. RCW 36.70B.110 (6) (d)² Appellant/Plaintiff did not contest either the determinations or the \$125.00 fine. Thirty days following the original notice, TMC 2.01.060 provides for \$250.00 per day fines. The City admits those fines are imposed without any right of the recipient of the notice to a hearing to determine whether or not the properties are in a substandard or derelict condition or whether the condition of the premises warrants a fine in the amount of \$250. (CP 435, 314, 392-393 Post & Solverson) The City also admits there is no deviation from the amount of the daily fine. The fine is \$250.00 if no work has been done on the property after receiving the original notice. The fine is \$250.00 if the work is nearly complete. (CP 241-245, CP 215) As an example, the apartment building at 1301-1311 South 8th was fined \$250.00 per day even though nearly all the work except painting the gables was complete. (CP 222-223) The City also states that Appellant/Plaintiff Post appealed only one case and the superior court affirmed that decision. This conclusion by counsel is incorrect. During

APPENDIX 11

RCW 7.80.010

Jurisdiction of courts.

(1) All violations of state law, local law, ordinance, regulation, or resolution designated as civil infractions may be heard and determined by a district court, except as otherwise provided in this section.

(2) Any municipal court has the authority to hear and determine pursuant to this chapter civil infractions that are established by municipal ordinance and that are committed within the jurisdiction of the municipality.

(3) Any city or town with a municipal court under chapter 3.50 RCW may contract with the county to have civil infractions that are established by city or town ordinance and that are committed within the city or town adjudicated by a district court.

(4) District court commissioners have the authority to hear and determine civil infractions pursuant to this chapter.

(5) Nothing in this chapter prevents any city, town, or county from hearing and determining civil infractions pursuant to its own system established by ordinance.

[1987 c 456 § 9.]

APPENDIX 12

RCW 35.22.280**Specific powers enumerated.**

Any city of the first class shall have power:

- (1) To provide for general and special elections, for questions to be voted upon, and for the election of officers;
- (2) To provide for levying and collecting taxes on real and personal property for its corporate uses and purposes, and to provide for the payment of the debts and expenses of the corporation;
- (3) To control the finances and property of the corporation, and to acquire, by purchase or otherwise, such lands and other property as may be necessary for any part of the corporate uses provided for by its charter, and to dispose of any such property as the interests of the corporation may, from time to time, require;
- (4) To borrow money for corporate purposes on the credit of the corporation, and to issue negotiable bonds therefor, on such conditions and in such manner as shall be prescribed in its charter; but no city shall, in any manner or for any purpose, become indebted to an amount in the aggregate to exceed the limitation of indebtedness prescribed by chapter 39.36 RCW as now or hereafter amended;
- (5) To issue bonds in place of or to supply means to meet maturing bonds or other indebtedness, or for the consolidation or funding of the same;
- (6) To purchase or appropriate private property within or without its corporate limits, for its corporate uses, upon making just compensation to the owners thereof, and to institute and maintain such proceedings as may be authorized by the general laws of the state for the appropriation of private property for public use;
- (7) To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof;
- (8) To change the grade of any street, highway, or alley within its corporate limits, and to provide for the payment of damages to any abutting owner or owners who shall have built or made other improvements upon such street, highway, or alley at any point opposite to the point where such change shall be made with reference to the grade of such street, highway, or alley as the same existed prior to such change;
- (9) To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of said city; and to provide by ordinance for the protection of all persons and property against injury in the use of such railroads or street railroads;
- (10) To provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof;
- (11) To acquire, by purchase or otherwise, lands for public parks within or without the limits of such city, and to improve the same. When the language of any instrument by which any property is so acquired limits the use of said property to park purposes and contains a reservation of interest in favor of the grantor or any other person, and where it is found that the property so acquired is not needed for park purposes and that an exchange thereof for other property to be dedicated for park purposes is in the public interest, the city may, with the consent of the grantor or such other person, his heirs, successors, or assigns, exchange such property for other property to be dedicated for park purposes, and may make, execute, and deliver proper conveyances to effect the exchange. In any case where, owing to death or lapse of time, there is neither donor, heir, successor, or assignee to give consent, this consent may be executed by the city and filed for record with an affidavit setting forth all efforts made to locate people entitled to give such consent together with the facts which establish that no consent by such persons is attainable. Title to property so conveyed by the city shall vest in the grantee free and clear of any trust in favor of the public arising out of any prior dedication for park purposes, but the right of the public shall be transferred and preserved with like force and effect to the property received by the city in such exchange;
- (12) To construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof;
- (13) To determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining contiguous, or proximate property, or others specially benefited thereby; and to provide for the manner of making and collecting assessments therefor;

(14) To provide for erecting, purchasing, or otherwise acquiring waterworks, within or without the corporate limits of said city, to supply said city and its inhabitants with water, or authorize the construction of same by others when deemed for the best interests of such city and its inhabitants, and to regulate and control the use and price of the water so supplied;

(15) To provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights, and to erect, or otherwise acquire, and to maintain the same, or to authorize the erection and maintenance of such works as may be necessary and convenient therefor, and to regulate and control the use thereof;

(16) To establish and regulate markets, and to provide for the weighing, measuring, and inspection of all articles of food and drink offered for sale thereat, or at any other place within its limits, by proper penalties, and to enforce the keeping of proper legal weights and measures by all vendors in such city, and to provide for the inspection thereof. Whenever the words "public markets" are used in this chapter, and the public market is managed in whole or in part by a public corporation created by a city, the words shall be construed to include all real or personal property located in a district or area designated by a city as a public market and traditionally devoted to providing farmers, crafts vendors and other merchants with retail space to market their wares to the public. Property located in such a district or area need not be exclusively or primarily used for such traditional public market retail activities and may include property used for other public purposes including, but not limited to, the provision of human services and low-income or moderate-income housing;

(17) To erect and establish hospitals and pesthouses, and to control and regulate the same;

(18) To provide for establishing and maintaining reform schools for juvenile offenders;

(19) To provide for the establishment and maintenance of public libraries, and to appropriate, annually, such percent of all moneys collected for fines, penalties, and licenses as shall be prescribed by its charter, for the support of a city library, which shall, under such regulations as shall be prescribed by ordinance, be open for use by the public;

(20) To regulate the burial of the dead, and to establish and regulate cemeteries within or without the corporate limits, and to acquire land therefor by purchase or otherwise; to cause cemeteries to be removed beyond the limits of the corporation, and to prohibit their establishment within two miles of the boundaries thereof;

(21) To direct the location and construction of all buildings in which any trade or occupation offensive to the senses or deleterious to public health or safety shall be carried on, and to regulate the management thereof; and to prohibit the erection or maintenance of such buildings or structures, or the carrying on of such trade or occupation within the limits of such corporation, or within the distance of two miles beyond the boundaries thereof;

(22) To provide for the prevention and extinguishment of fires and to regulate or prohibit the transportation, keeping, or storage of all combustible or explosive materials within its corporate limits, and to regulate and restrain the use of fireworks;

(23) 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;

(24) To regulate the manner in which stone, brick, and other buildings, party walls, and partition fences shall be constructed and maintained;

(25) To deepen, widen, dock, cover, wall, alter, or change the channels of waterways and courses, and to provide for the construction and maintenance of all such works as may be required for the accommodation of commerce, including canals, slips, public landing places, wharves, docks, and levees, and to control and regulate the use thereof;

(26) To control, regulate, or prohibit the anchorage, moorage, and landing of all watercrafts and their cargoes within the jurisdiction of the corporation;

(27) To fix the rates of wharfage and dockage, and to provide for the collection thereof, and to provide for the imposition and collection of such harbor fees as may be consistent with the laws of the United States;

(28) To license, regulate, control, or restrain wharf boats, tugs, and other boats used about the harbor or within such jurisdiction;

(29) To require the owners of public halls or other buildings to provide suitable means of exit; to provide for the prevention and abatement of nuisances, for the cleaning and purification of watercourses and canals, for the drainage and filling up of ponds on private property within its limits, when the same shall be offensive to the senses or dangerous to health; to regulate and control, and to prevent and punish, the defilement or pollution of all streams running through or into its corporate limits, and for the distance of five miles beyond its corporate limits, and on any stream or lake from which the water supply of said

city is taken, for a distance of five miles beyond its source of supply; to provide for the cleaning of areas, vaults, and other places within its corporate limits which may be so kept as to become offensive to the senses or dangerous to health, and to make all such quarantine or other regulations as may be necessary for the preservation of the public health, and to remove all persons afflicted with any infectious or contagious disease to some suitable place to be provided for that purpose;

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

(31) To regulate the selling or giving away of intoxicating, malt, vinous, mixed, or fermented liquors as authorized by the general laws of the state: PROVIDED, That no license shall be granted to any person or persons who shall not first comply with the general laws of the state in force at the time the same is granted;

(32) To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same: PROVIDED, That no license shall be granted to continue for longer than one year from the date thereof;

(33) To regulate the carrying on within its corporate limits of all occupations which are of such a nature as to affect the public health or the good order of said city, or to disturb the public peace, and which are not prohibited by law, and to provide for the punishment of all persons violating such regulations, and of all persons who knowingly permit the same to be violated in any building or upon any premises owned or controlled by them;

(34) To restrain and provide for the punishment of vagrants, mendicants, prostitutes, and other disorderly persons;

(35) To provide for the punishment of all disorderly conduct, and of all practices dangerous to public health or safety, and to make all regulations necessary for the preservation of public morality, health, peace, and good order within its limits, and to provide for the arrest, trial, and punishment of all persons charged with violating any of the ordinances of said city. The punishment shall not exceed a fine of five thousand dollars or imprisonment in the city jail for one year, or both such fine and imprisonment. The punishment for any criminal ordinance shall be the same as the punishment provided in state law for the same crime. Such cities alternatively may provide that violations of ordinances constitute a civil violation subject to monetary penalties, but no act which is a state crime may be made a civil violation;

(36) To project or extend its streets over and across any tidelands within its corporate limits, and along or across the harbor areas of such city, in such manner as will best promote the interests of commerce;

(37) To provide in their respective charters for a method to propose and adopt amendments thereto.

[1993 c 83 § 4; 1990 c 189 § 3; 1986 c 278 § 3; 1984 c 258 § 802; 1977 ex.s. c 316 § 20; 1971 ex.s. c 16 § 1; 1965 ex.s. c 116 § 2; 1965 c 7 § 35.22.280. Prior: 1890 p 218 § 5; RRS § 8966.]

Notes:

Effective date – 1993 c 83: See note following RCW 35.21.163.

Severability – 1986 c 278: See note following RCW 36.01.010.

Court Improvement Act of 1984 – Effective dates – Severability – Short title – 1984 c 258: See notes following RCW 3.30.010.

Severability – 1977 ex.s. c 316: See note following RCW 70.48.020.

APPENDIX 13

RCW 36.70C.020
Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Land use decision" means 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:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

(2) "Local jurisdiction" means a county, city, or incorporated town.

(3) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

[1995 c 347 § 703.]

APPENDIX 14

Chapter 36.70C RCW Judicial review of land use decisions

Chapter Listing

RCW Sections

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 - 36.70C.010 Purpose.
 - 36.70C.020 Definitions.
 - 36.70C.030 Chapter exclusive means of judicial review of land use decisions – Exceptions.
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 - 36.70C.090 Expedited review.
 - 36.70C.100 Stay of action pending review.
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 - 36.70C.120 Scope of review – Discovery.
 - 36.70C.130 Standards for granting relief.
 - 36.70C.140 Decision of the court.
 - 36.70C.900 Finding – Severability – Part headings and table of contents not law – 1995 c 347.
-

36.70C.005 Short title.

This chapter may be known and cited as the land use petition act.

[1995 c 347 § 701.]

36.70C.010 Purpose.

The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

[1995 c 347 § 702.]

36.70C.020 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Land use decision" means 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:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

(2) "Local jurisdiction" means a county, city, or incorporated town.

(3) "Person" means an individual, partnership, corporation, association, public or private organization, or governmental entity or agency.

[1995 c 347 § 703.]

36.70C.030

Chapter exclusive means of judicial review of land use decisions — Exceptions.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board, the environmental and land use hearings board, or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

[2003 c 393 § 17; 1995 c 347 § 704.]

Notes:

Implementation – Effective date – 2003 c 393: See RCW 43.21L.900 and 43.21L.901.

36.70C.040

Commencement of review — Land use petition — Procedure.

(1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;

(b) Each of the following persons if the person is not the petitioner:

(i) Each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application; and

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection.

(3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issuance of the land use decision.

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(5) Service on the local jurisdiction must be by delivery of a copy of the petition to the persons identified by or pursuant to RCW 4.28.080 to receive service of process. Service on other parties must be in accordance with the superior court civil rules or by first class mail to:

(a) The address stated in the written decision of the local jurisdiction for each person made a party under subsection (2)(b) of this section;

(b) The address stated in the records of the county assessor for each person made a party under subsection (2)(c) of this section; and

(c) The address stated in the appeal to the quasi-judicial decision maker for each person made a party under subsection (2)(d) of this section.

(6) Service by mail is effective on the date of mailing and proof of service shall be by affidavit or declaration under penalty of perjury.

[1995 c 347 § 705.]

36.70C.050
Joinder of parties.

If the applicant for the land use approval is not the owner of the real property at issue, and if the owner is not accurately identified in the records referred to in RCW 36.70C.040(2) (b) and (c), the applicant shall be responsible for promptly securing the joinder of the owners. In addition, within fourteen days after service each party initially named by the petitioner shall disclose to the other parties the name and address of any person whom such party knows may be needed for just adjudication of the petition, and the petitioner shall promptly name and serve any such person whom the petitioner agrees may be needed for just adjudication. If such a person is named and served before the initial hearing, leave of court for the joinder is not required, and the petitioner shall provide the newly joined party with copies of the pleadings filed before the party's joinder. Failure by the petitioner to name or serve, within the time required by RCW 36.70C.040(3), persons who are needed for just adjudication but who are not identified in the records referred to in RCW 36.70C.040(2)(b), or in RCW 36.70C.040(2)(c) if applicable, shall not deprive the court of jurisdiction to hear the land use petition.

[1995 c 347 § 706.]

36.70C.060

Standing.

Standing to bring a land use petition under this chapter is limited to the following persons:

- (1) The applicant and the owner of property to which the land use decision is directed;
- (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
 - (a) The land use decision has prejudiced or is likely to prejudice that person;
 - (b) That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;
 - (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
 - (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

[1995 c 347 § 707.]

36.70C.070

Land use petition — Required elements.

A land use petition must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the local jurisdiction whose land use decision is at issue;
- (4) Identification of the decision-making body or officer, together with a duplicate copy of the decision, or, if not a written decision, a summary or brief description of it;
- (5) Identification of each person to be made a party under RCW 36.70C.040(2) (b) through (d);
- (6) Facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060;

- (7) A separate and concise statement of each error alleged to have been committed;
- (8) A concise statement of facts upon which the petitioner relies to sustain the statement of error; and
- (9) A request for relief, specifying the type and extent of relief requested.

[1995 c 347 § 708.]

36.70C.080

Initial hearing.

(1) Within seven days after the petition is served on the parties identified in RCW 36.70C.040(2), the petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties identified in RCW 36.70C.040(2).

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

[1995 c 347 § 709.]

36.70C.090

Expedited review.

The court shall provide expedited review of petitions filed under this chapter. The matter must be set for hearing within sixty days of the date set for submitting the local jurisdiction's record, absent a showing of good cause for a different date or a stipulation of the parties.

[1995 c 347 § 710.]

36.70C.100

Stay of action pending review.

(1) A petitioner or other party may request the court to stay or suspend an action by the local jurisdiction or another party to implement the decision under review. The request must set forth a statement of grounds for the stay and the factual basis for the request.

(2) A court may grant a stay only if the court finds that:

(a) The party requesting the stay is likely to prevail on the merits;

(b) Without the stay the party requesting it will suffer irreparable harm;

(c) The grant of a stay will not substantially harm other parties to the proceedings; and

(d) The request for the stay is timely in light of the circumstances of the case.

(3) The court may grant the request for a stay upon such terms and conditions, including the filing of security, as are necessary to prevent harm to other parties by the stay.

[1995 c 347 § 711.]

36.70C.110

Record for judicial review — Costs.

(1) Within forty-five days after entry of an order to submit the record, or within such a further time as the court allows or as the parties agree, the local jurisdiction shall submit to the court a certified copy of the record for judicial review of the land use decision, except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.

(2) If the parties agree, or upon order of the court, the record shall be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative or not relevant to the issues to be reviewed by the court.

(3) The petitioner shall pay the local jurisdiction the cost of preparing the record before the local jurisdiction submits the record to the court. Failure by the petitioner to timely pay the local jurisdiction relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition.

(4) If the relief sought by the petitioner is granted in whole or in part the court shall equitably assess the cost of preparing the record among the parties. In assessing costs the court shall take into account the extent to which each party prevailed and the reasonableness of the parties' conduct in agreeing or not agreeing to shorten or summarize the record under subsection (2) of this section.

[1995 c 347 § 712.]

36.70C.120

Scope of review — Discovery.

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

(a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding;
or

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

(3) For land use decisions other than those described in subsection (1) of this section, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

(4) The court may require or permit corrections of ministerial errors or inadvertent omissions in the preparation of the record.

(5) The parties may not conduct pretrial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a prima facie showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that are raised under subsections (2) and (3) of this section. If the court allows the record to be supplemented, the court shall require the parties to disclose before the hearing or trial on the merits the specific evidence they intend to offer. If any party, or anyone acting on behalf of any party, requests records under chapter 42.56 RCW relating to the matters at issue, a copy of the request shall simultaneously be given to all other parties and the court shall take such request into account in fashioning an equitable discovery order under this section.

[2005 c 274 § 273; 1995 c 347 § 713.]

Notes:

Part headings not law – Effective date – 2005 c 274: See RCW 42.56.901 and 42.56.902.

36.70C.130

Standards for granting relief.

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

[1995 c 347 § 714.]

36.70C.140

Decision of the court.

The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

[1995 c 347 § 715.]

36.70C.900

Finding — Severability — Part headings and table of contents not law — 1995 c 347.

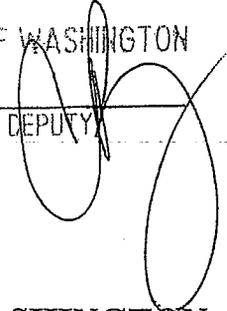
See notes following RCW 36.70A.470.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PAUL POST,

No. 34808-0-II

Appellant,

v.

ORDER AMENDING OPINION

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

Respondents.

The published opinion in this case was filed on August 14, 2007. This opinion is hereby amended as follows:

On page 11, the last full paragraph that reads:

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

is deleted.

On page 4, Section II, Paragraph 2, the sentence that reads:

The State points out that Post appealed on one property, but both the Hearing Examiner and the superior court affirmed the City's penalties.

is deleted. The following sentence is inserted in its place:

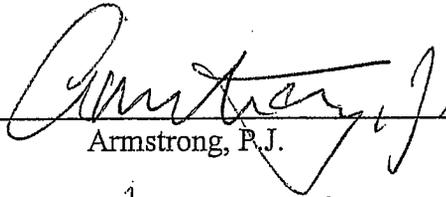
The City points out that Post appealed on one property, but both the Hearing Examiner and the superior court affirmed the City's penalties.

IT IS SO ORDERED.

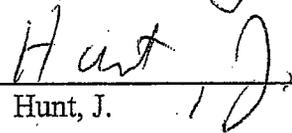
DATED this 11th day of August, 2007.



Penyar, J.



Armstrong, P.J.



Hunt, J.