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Supreme Court No. 96613-3

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CHURCH OF THE DIVINE EARTH,  
*Petitioner,*  
v.  
CITY OF TACOMA,  
*Respondent.*

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**BRIEF OF AMICUS CURIAE BUILDING INDUSTRY  
ASSOCIATION OF WASHINGTON**

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## **I. INTRODUCTION**

For permitting systems to work, there must be accountability when a permitting body violates the law. This led the legislature to pass RCW 64.40.020. The Court of Appeals decision here makes enforcing those legislatively created consequences impossible. The lower court's decision waters down the "knew or should have known" standard by taking it from objective and enforceable to subjective and useless. If the Court of Appeals decision remains, permit applicants will have little or no recourse when a permitting body violates their rights. This Court should reverse.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Building Industry Association of Washington ("BIAW") represents over 8,000 members of the home-building industry. BIAW is made up of 14 affiliated local associations: the Building Industry Association of Clark County, the Central Washington Home Builders Association, the Jefferson County Home Builders Association, the Master Builders Association of King and Snohomish Counties, the Home Builders Association of Kitsap County, the Lower Columbia Contractors Association, the North Peninsula Building Association, the Olympia Master Builders, the Master Builders Association of Pierce County, the San Juan Builders Association, the Skagit-Island Counties Builders Association, the

Spokane Home Builders Association, the Home Builders Association of Tri-Cities, and the Building Industry Association of Whatcom County.

BIAW's members are engaged in every aspect of the residential construction industry and the vast majority of BIAW builders construct between 1 and 5 single-family houses per year. RCW 64.40 provides a check on permitting bodies, an area of constant concern to builders. Without reliable redress, all perception of fairness vacates the permitting process. BIAW, on behalf of its members, speaks with authority on the impact of this case on expectation that permitting bodies be aware of the law governing permit issuance.

### **III. ISSUE OF INTEREST TO AMICUS CURIAE**

- 1) Whether the Court of Appeals followed RCW 64.40.020 when it used a subjective standard to determine what a permitting body should have known.
- 2) Clarifying the effect of lower standards of accountability on the building industry.

### **IV. ARGUMENT**

The Court of Appeals was correct that the import of RCW 64.40.020 is to impose liability when “the City knew or should have known that its act was unlawful.” *Church of the Divine Earth v. City of Tacoma*, 5 Wn. App. 2d 471, 490, 426 P.3d 268, 278 (2018) (“Decision”). To apply RCW 64.40.020, the Court should have considered two questions. First, what facts did the City of Tacoma (“City”) know or should have reasonably inferred

about the actions it took? This question must be answered first because knowing that an action is “unlawful” requires a factual understanding of that action. To determine whether the City knew or should have known its actions were unlawful, the Court should examine what facts were available to the City which would inform its understanding of the law.

Second, what law did the City know or should the City have reasonably known when it decided to impose an admittedly unconstitutional condition on the Church? This analysis requires applying available law to the facts determined in examining the first question. If applying the law to the facts would lead a reasonable city to conclude that its actions were unconstitutional, then the litigant-City *should* have known that its actions were unconstitutional.

The lower court’s analysis of both questions was flawed. The Court of Appeals erred by failing to engage in any analysis of the facts. The Court of Appeals also erred by failing to ask what a reasonable city would have concluded in applying the available law to the facts. Rather than answer the objective question of what the City “should have known<sup>1</sup>” the lower court

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<sup>1</sup> “Should have known” is generally treated as an objective test. See, e.g., Annalise H. Scobey *Putting Beer Goggles on the Jury: Rape, Intoxication, and the Reasonable Man in Commonwealth v. Mountry*, 48 New Eng. L. Rev. 203, 208(2013) (“The objective second prong - what the defendant should have known - analyzes what level of knowledge a reasonable person in the defendant's circumstances would have possessed”); Sharon Dolovich, *Cruelty, Prison Conditions and the Eighth Amendment*, 84 N.Y.U.L.

simply stated that the litigant-City had thought about the requirements of the applicable law and so should not have known that its actions were unlawful.

**a. RCW 64.40.020 Dictates that the City Is Held to the Objective Standard of a Reasonable Agency on Both Factual and Legal Knowledge.**

In RCW 64.40.020(1) the Legislature created a mechanism for accountability in the land use permitting process. *Lutheran Day Care v. Snohomish Cy.*, 119 Wn.2d 91, 103, 829 P.2d 746 (1992). The statute reads:

Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.

RCW 64.40.020(1). The knowledge element in this statute allows courts to consider constructive knowledge. Black's Law Dictionary defines constructive knowledge as knowledge that one using reasonable care or

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Rev. 881, 950 (2009) (“Assuming the adoption of an objective “should have known” standard in both contexts, Justice Stevens's dissent helps us to see that in the case of macro-level failures, official knowledge of the risk ought to be irrebuttably presumed-- not because official culpability is unnecessary but because when prisoners suffer sufficiently serious harms from macro-level inadequacies, the mere fact of such inadequacies is proof enough of official culpability”).

diligence should have, and therefore that is attributed by law to a given person. *Constructive Knowledge*, Black's Law Dictionary (10th ed. 2014). That is exactly what RCW 64.40.020 addresses.

The constructive knowledge component of the statute uses language that is familiar from many other contexts. *See, e.g., State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160, 165 (1990) (Affirming a jury instruction that permitted the jury to find that the defendant should have known that property he received was stolen when the defendant knew facts that would lead a reasonable person to believe the property was stolen); RCW 9A.08.010(1)(b) (defining knowledge in the criminal context to exist when the party “has information which would lead a reasonable person in the same situation to believe that facts exist [which constitute a crime].”); *Tafoya v. Human Rights Comm’n*, 177 Wn. App. 216, 311 P.3d 70 (2013) (finding that a landlord’s spouse was liable for failing to take steps to prevent harassment against a tenant where she should have known of the harassment; a landlord cannot avoid liability simply by ignoring a tenant’s complaint.).

Generally, according to these other instances of “knew or should have known” language, constructive knowledge statutes hold parties to a standard of reasonableness only in their factual understanding of a situation, not a legal understanding of the import of their actions. In contrast, for RCW

64.40.020, the question is slightly different because the statute applies the constructive knowledge language, not only to factual understanding, but also to legal understanding.<sup>2</sup> In both the factual and legal sense, the “should have known” language in RCW 64.40.020 holds the City to execute its duty to an objective, reasonable standard.

The Court of Appeals used all the wrong tools to answer both the factual and legal question of the City’s knowledge. Factually, the lower court relied on the subjective, conclusory belief of the City, rather than performing an objective analysis of the facts and inferences available to a “reasonable” actor. Legally, the Court of Appeals did not examine what a reasonable, similarly situated permitting body would know, but essentially held that where the agency made an effort to apply the right law, the agency can never be liable for getting it wrong. This is not the intent of the statute.

**b. The Court of Appeals Improperly Relied on Subjective Belief to Decide What the City Factually Should Have Known.**

The Court of Appeals relied on the City’s subjective belief that it was behaving properly to decide the objective question of what the City should have known. The Decision reads:

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<sup>2</sup> As quoted above, the statute calls for actual or constructive knowledge of “unlawfulness.” Unlawfulness cannot be determined through facts alone. Knowing an act is unlawful requires knowing the law governing the facts. See Unlawful, Black’s Law Dictionary (10th ed. 2014) (defining “unlawful” as “[n]ot authorized by law”).

Here, the trial court found that the City's employees performed reviews before imposing the requirements to the Church's building permit. The trial court further found that the City's employees had performed a *Nollan/Dolan* analysis in their review of the permit application and, after considering the impact of the Church's proposed development, determined that the dedication requirement was necessary. These facts support the trial court's conclusion that the City reasonably believed that the development conditions had a nexus to the project and were proportional. In other words, the City reasonably believed that the dedication satisfied the requirements of *Nollan/Dolan*. Because the City reasonably believed that it satisfied the requirements of *Nollan/Dolan*, it did not know and should not have known that its action was unlawful at the time it took the action.

Decision at 494 (emphasis added). The court relied on the belief of the litigant-City, rather than examining the facts available to the City and what conclusions a reasonable city would draw based on those facts. This was also an error because the level of effort or analysis a party engaged in is irrelevant to determining what the party reasonably should have known.

Here, the factual background and reasonable inferences are crucial. The Ninth Circuit has held that the existence of an “essential nexus” is a mixed question of law and fact. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999).<sup>3</sup> Furthermore, Washington law makes clear that a mere assertion that a permitted activity

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<sup>3</sup> In *Del Monte Dunes*, a city denied a landowner-developer's permit applications repeatedly, in violation of the landowner's property rights. The trial court sent the case to a jury, who found that the denial of the permits lacked nexus with the city's stated objectives, among other violations. On appeal, the Ninth Circuit held that the inquiry presented a mixed question of law and fact which a jury may decide. The Supreme Court affirmed, but did not explicitly endorse the Ninth Circuit's holding on this point.

would create a negative impact or that the condition imposed would mitigate that impact is insufficient. Rather, the permitting state actor must show that the permitted activity would create a public problem and must show that the condition imposed will mitigate that problem. *See, e.g., Isla Verde Int'l v. City of Camas*, 99 Wn. App. 127, 990 P.2d 429 (1999); *Burton v. Clark Cty.*, 91 Wn. App. 505, 958 P.2d 343 (1998).

Based on the facts available to the Superior Court, the condition City imposed on Church was unconstitutional. Decision at 478. The City had access to the same set of facts at the time of Hearing Examiner's decision that the Superior Court relied on. Verbatim Report of Proceedings (VRP) (February 19, 2015) at 5. In its motion for summary judgment before the Hearing Examiner, the City stated that those facts were sufficient for its decision.<sup>4</sup> VRP (February 19, 2015) at 5. Taking the City at its word, it follows that the City also had facts sufficient to evaluate the constitutional issue at hand. These are the facts it had: First, the City knew that the plat Church intended to develop had been the same shape for over a century and had already been zoned for single-family residential use. VRP (February

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<sup>4</sup> After making this assertion, the City sought to augment the record with other information it claims influenced its actions. But the Superior Court properly struck that information. Furthermore, any shortcomings in the record must be construed against the City because the government bears the burden of proving that a condition satisfies the constitutional requirements of nexus and proportionality. *Dolan v. City of Tigard*, 512 U.S. 374, 395, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

19, 2015) at 19. Second, the City knew that the intended construction would not change the impact the plat's shape may have on sidewalk development or any other public use because the Church's activities did not change the shape of the plat. VRP (February 19 2015) at 25. This is the sum total of all facts that the City proved, as the bare assertion<sup>5</sup> that the Church's building might increase traffic falls short of *Burton*, above. Based on these proven, known facts, the City should have known that the problems it wanted to solve regarding the plat's shape had no nexus to the activity for which the Church sought a permit.

The existence or lack of a nexus is a fact which can be known or reasonably inferred. Admittedly, circumstances could exist where the sufficiency of the nexus could call for a more nuanced consideration. Here, there is no need for nuance. The City should have known that there was factually no nexus between the conditions imposed and the permit sought, making them responsible under RCW 64.40.020.

**c. The Court of Appeals Improperly Relied on Subjective Belief to Decide What the City Should Have Known About the Law Governing Its Conduct.**

Even if the facts did not make clear that the City's condition was unconstitutional, a review of the law governing conditions would have

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<sup>5</sup> This assertion was not presented by the City prior to the "final decision" of the Hearing Examiner, making its usefulness negligible even if true.

cleared up any confusion for a reasonable city. The Court of Appeals repeatedly references the effort the City put into reaching the right conclusion, but never examines the law available to the City or the reasonable application of that law to the facts. This was error. Because constructive knowledge denotes a duty to take reasonable steps to know relevant law, the lower court should have asked what a reasonable city would have concluded based on the available law, not what the litigant-City did conclude, no matter how thoroughly it considered its conclusion.

RCW 64.40.020's use of constructive knowledge in evaluating lawfulness shows that the statute presumes that the governed agencies "should" know the law. People empowered to enforce the law have an obligation to know the law that governs that enforcement. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19, 102 S. Ct. 2727 (1982).

With that in mind, any answer to what the City should have known about the law governing conditional permit approval must begin with a review of the law at the time of the Hearing Examiner's decision on August 19, 2014. In June, 2013, the United States Supreme Court decided *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S. Ct. 2586 (2013). In that case, the Supreme Court summarized the existing law, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129

L. Ed. 2d 304 (1994), as follows: “a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a “nexus” and “rough proportionality” between the government’s demand and the effects of the proposed land use.” *Koontz*, 570 U.S. at 599. As the Hearing Examiner’s decision was issued 14 months after *Koontz*, 20 years after *Nollan*, and 27 years after *Dolan*, the City should have known the law of unconstitutional conditions.

The City’s argument to the contrary, claiming that an obligation to know the law governing its conduct negates the language of RCW 64.40.020, is inaccurate. The knowledge requirement in RCW 64.40.020 codifies their duty to know; it does not minimize it. The statute allows the City to assert defenses showing reasonable lack of knowledge. This could apply when, despite reasonable efforts, the City had some factual misunderstanding that led to the imposition of an unconstitutional condition. It could also apply if the law governing the action at issue was unsettled, such as conditioning a permit to engage in a specific profession on relinquishing certain property before *Horne v. Dept’t of Agric.* 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015). The knowledge requirement does not negate the clear duty of those enforcing the laws to be familiar with their content and import.

**d. Builders Depend on Credible, Accountable Permitting Bodies.**

The purpose of RCW 64.40 is to “provide a swift remedy for property damage caused by governmental agency action.” *Wilson v. City of Seattle*, 122 Wn.2d 814, 825, 863 P.2d 1336, 1341 (1993). The statute creates a level of accountability that adds to both the reality of fairness and the perception of fairness in the permitting process. The Court of Appeals decision to allow the City’s subjective belief in its own rightness to negate the statutory damages provision undermines the statute entirely.

Lack of trust and certainty in the permitting process among builders when making decisions makes new development a less attractive investment to builders and their financial allies. The relationship between regulatory uncertainty and market shrinkage a given in the economic community.

“[F]irms worldwide regularly make decisions under varying conditions of political uncertainty: How secure are property rights? Are contracts enforceable? [...] The credibility of these political institutions fundamentally shapes the ability of firms to make capital investment decisions[.]”<sup>6</sup>

In short, builders rely on RCW 64.40’s requirement that permitting bodies be held to a standard of reasonableness to be confident in their

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<sup>6</sup> Andrew B. Whitford, *The Reduction of Regulatory Uncertainty: Evidence from Transfer Pricing Policy*, 55 St. Louis U. L.J. 269, 273 (2010) available at <https://pdfs.semanticscholar.org/d724/284131279b4c7a9d7a76d1be6756870a819d.pdf>.

building decisions. Removing the objective reasonableness from that review would be devastating.

**V. CONCLUSION**

In conclusion, this Court should reverse the lower court's ruling. The City should have known that its condition was unconstitutional. To side with City would undermine core principles of statutory construction and allow permitting agencies to avoid liability by hiding their heads in the sand. This Court should reverse.

Respectfully submitted this 29<sup>th</sup> day of April, 2019,

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