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NO. 96613-3

SUPREME COURT  
OF THE STATE OF WASHINGTON

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

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THE CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

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APPELLANT CHURCH'S RESPONSE TO AMICUS BRIEFS OF  
PACIFIC LEGAL FOUNDATION AND  
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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**I. RESPONSE TO BRIEF OF PACIFIC LEGAL FOUNDATION (PLF)**

The PLF brief is divided into three sections: I. Government officials have a duty to know the law in the area of their work; II. The doctrine of unconstitutional conditions defines a limitation on lawful government action; and III. An act that violates the Takings Clause is unlawful.

These propositions on their face seem rather unremarkable however the City's response brief takes issue with the obvious.

**A. Government Officials Have a Duty to Know the Law in the Area of their Work**

PLF summarizes the doctrine of unconstitutional conditions when applied to land use permitting conditions, citing *Nollan v. California Coastal Comm'n*, 483 U.S. 826, 837, 107 S. Ct. 3141, 97L. Ed. 2d 677 (1987) and related authority on p. 2 of its brief. Before demanding a dedication as a condition of permit approval, "the government [must] make some sort of individualized determination that the required dedication of private land is related both in nature and extent to the impact of the proposed development." PLF brief p. 3, quoting *Federal Way v. Town and Country Real Estate*, 161 Wn. App. 17, 44, 252 P.3d 382 (2011) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)) To satisfy the nexus part of the inquiry the

government is required to (1) identify a problem the condition is designed to address; (2) prove the development will create or exacerbate the identified problem; and (3) prove the proposed condition tends to solve the identified problem.

The City's response admits it actually knew the law re: *Nollan/Dolan*. It does not quarrel with the basic formulation of the rule posited by PLF but disputes PLF's statement that it "failed to show any facts satisfying either requirement in the record" and therefore it was obvious error for the lower court to conclude the City neither knew nor should have known its right of way demand was unlawful. PLF p. 4

Rather the City claims trial court factual findings sustain its position that it met the nexus standard of proof, referencing Finding 3 that the Review Panel "considered" impacts. As set forth in detail in the Church's response to the City's Supplement brief, (1) this and other findings do not relate to the final decision of the Hearing Examiner but rather preliminary discussions of staff; and (2) are not factual statements adequate to satisfy the aforementioned elements of the nexus test. Rather they merely state staff "considered" something. Nor does Finding 6 factually state how construction of the parsonage would "impair" traffic safety much less quantify it. Finding 7 merely claims visibility concerns were "explained" to Mr. Kuehn without stating what those concerns were

nor how they related to building a replacement house on a previously platted lot. Safety concerns about how the road was configured, for example, have nothing to do with the proposed permitted activity. Perhaps they could be the basis of an eminent domain proceeding but that would require payment of just compensation. Testimony from various City witnesses (City Response p. 2) not reduced to factual findings are meaningless; however as pointed out in the Church's response to the City's Supplemental Brief, none of this testimony was in support of the City "final decision" from the Hearing Examiner but contradicted it.

PLF is exactly right that the city "failed to show any facts to show it satisfied either [the *Nollan* or *Dolan*] requirement in the record." PLF p. 4

*Dolan* holds for the government to carry its burden to prove nexus and proportionality it must quantify with facts and figures the actual impact of the development and the condition it imposes on the permit.

But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The City simply found that the creation of the pathway "could offset some of the traffic demand...and lessen the increase in traffic congestion"...No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway...

*Dolan*, 512 U.S. at 395 But here the Findings are not only irrelevant because they do not pertain to the actual final decision of the Hearing Examiner which required a 30 foot dedication to make the right of way uniform (not 8 feet for a path), but they do not quantify the claimed impacts of the project at all. On its face the only claimed reason for the condition, uniformity of the right of way, has no nexus to any proposed residential construction.

There was no finding of how many vehicle or pedestrian trips this replacement single family residence would generate. There was no finding how many preexisted the project. There was no numerator and denominator to determine the alleged impact and measure the proportionality of the alleged cure. What the regulators “considered” doesn’t quantify an impact. Finding 3 Finding staff “conducted a *Nollan/Dolan* analysis”, Finding 5, without disclosing much less quantifying the result isn’t a “fact” upon which an impact may be calculated or a condition sustained. Finding construction of the parsonage “increased the problems associated with the too-narrow right of way” e.g. safe pedestrian and vehicular traffic, Finding 6, without quantifying the impact or even identifying the nature of the problem doesn’t meet the *Dolan* standard either.

These are important and required facts necessary to conduct a proper unconstitutional condition analysis which the City utterly failed to determine. The City should have known it failed the *Nollan/Dolan* test in this respect as well.

Thereafter the PLF cites numerous cases for the proposition the City “should have known” conditions on permits without nexus to the development are unlawful.

PLF states the only exception to the presumption that the government knows the law is a case of first impression. PLF 5 *Isle Verde Int’l Holdings v. Camas*, 147 Wn. App. 454, 469-70, 196 P.3d 719 (2008) The City doesn’t respond to that.

PLF relies on several U.S. Supreme Court cases that the land use official *should* know the law such as *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. ed. 2d 396 (1982) PLF 5-6 The City responds those cases discuss qualified immunity under 42 USC 1983 **Error! Bookmark not defined.** not the knowledge requirement of RCW 64.40.020. City Response p. 3 But PLF didn’t urge this court adopt a “good faith” qualified immunity, rather points out a “good faith” qualified immunity standard is much more difficult for a plaintiff to satisfy than the “knew” or “should have known” standard of RCW 64.40, which is much lower, citing *Harlow* 457 U.S. at 813-14. PLF p. 6 n. 4

The City adds: “Apparently, Pacific is also claiming that because the briefing at the LUPA hearing was inadequate to persuade the LUPA judge, the City should have known it was not going to prevail at the LUPA hearing.” City Response p. 5 But that wasn’t PLF’s argument.

Rather since the City bears the burden of creating a factual record establishing the constitutionality of its right-of-way demand in the first instance, *Dolan* 512 U.S. at 395, PLF p. 6, a Finding that the City’s bare belief that its demand would be upheld in court—absent a factual record demonstrating and quantifying nexus and proportionality—cannot relieve it of its duty to know the law.

The Church has never claimed the City LUPA briefs were in any way “inadequate.” These briefs defended the Hearing Examiner Decision at issue in the LUPA appeal, not the March 7 letter which was contrary to the Hearing Examiner Decision. The Hearing Examiner affirmed a 30 foot right of way dedication requirement solely for the sake of uniformity. After the LUPA hearing the City raised for the first time “concerns” regarding traffic and safety which were not before the Hearing Examiner. Obviously same played no role in the Final Decision which the City knew and should have known was unlawful.

The City claims that just because it “lost at LUPA does not establish as a matter of law the requirement of RCW 64.40 that the City’s

action was unlawful.” City Brief p. 6 Of course it does. The City is collaterally estopped to deny its action was unlawful and both the trial court and Court of Appeals so held. That may not however establish liability under 64.40 as the knowledge requirement is a separate issue. RCW 36.70C.130 does not bar issue preclusion and this court didn’t grant review on the application of that statute in any event.

**B. The Doctrine of Unconstitutional Conditions defines a Limitation on Lawful Government Action**

The church agrees entirely with PLF on this topic and has nothing to add.

**C. An Act that Violates the Takings Clause is Unlawful**

The Church agrees entirely with this proposition and did not understand the trial court or the Court of Appeals to differ. Moreover, the issue accepted for review assumes the action under review is unlawful, restricting review to whether the City did or should have known it.

**II. RESPONSE TO BRIEF OF BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW)**

The BIAW thoughtfully analyzes the “knew or should have known” requirement of RCW 64.40.020, concluding this poses an objective standard of law applied to known facts.

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 was unsettled...The knowledge requirement does not negate the clear duty of those enforcing the laws to be familiar with their content and import.

BIAW brief p. 11 Here it was the responsibility of the City to know the facts upon which it based its condition and there was no mistake. And the fundamental law of unconstitutional conditions as set forth in *Nollan* and related authority was well settled. The City does not claim otherwise.

Rather the City engages in a blatant deception in an effort to misrepresent its Final Decision as rendered by its Hearing Examiner. (Ex. P105) Recall that Final Decision imposed the right of way dedication condition on the Church by incorporating the Amended Declaration of Huffman of July 9, 2014 (ex P98) on the Church by reference. (Ex. P105 p. 9) On page 5 of the Final Decision the Hearing Examiner discussed the March 7, 2014 letter with attached memo from Kammerzell purporting to reduce the dedication requirement from 30 feet to eight. But in the next paragraph the Examiner ruled:

10. *Subsequently, the City further revised its requirements for off-site improvements at 6605 East B Street, stating:*

“{T]he City is now merely requiring Appellant to dedicate an area of approximately 2,472 square feet at the front of the Subject property in order for the Subject Property and surrounding area to have a uniform right-of-way (‘ROW’) width for street frontage...”

Ex. P105 p. 5 (italics added) According to the Court of Appeals as well as the trial court the Hearing Examiner Decision is the “final decision” for purposes of RCW 64.40.020. But the City claims it is the March 7 letter knowing full well it couldn’t be and isn’t. This deception is further outlined and documented in “Appellant Church’s Response to City’s Supplemental Brief” as well as in virtually every other brief the Church has filed.

The Final Decision of the City conditioned the Church’s building permit on the Church dedicating 2,472 square feet of its property (30 foot equivalent) to make the right of way uniform. At the LUPA hearing the deputy City Attorney for Elizabeth Pauli lied when he claimed the Hearing Examiner Decision required 8 feet rather than 30 (and Judge Martin took his word for it rather than reading the decision); however Judge Martin concluded (Ex. P116) size didn’t matter because the City’s dedication condition to promote a uniform right of way of *any* size had no nexus to the proposed permitted construction and thus was an unconstitutional condition under *Nollan*.

Understanding the true nature of the “final decision” is *absolutely essential* to a proper resolution of the case. The City will not and cannot defend the Hearing Examiner’s final decision requiring a dedication to make the right of way uniform because that obviously lacks any purported

nexus to the proposed construction of a single family home on its face. That right of way was delineated more than 100 years prior to the Church's application and the Church's proposed construction would not change it.

So the City Attorney has decided if it can't defend the Final Decision it will misrepresent it. None of the trial court findings relied upon to establish some nexus are based on the actual final decision but on the March 7 letter, which was not only *not* the final decision but not a decision from Director Huffman, the only person who could decide a waiver request. TMC 13.05.030 (A) (5) The March 7 letter from a staffer was not subject to administrative appeal, only the Letter Decision of Huffman entered on April 28, 2014. Ex. P84 That Letter Decision denied the Church's waiver request in its entirety, including denial of the Church's request to waive the 30 foot dedication requirement. That Letter Decision, unlike the March 7 letter, contained the mandatory admonition required by the TMC that it would be final unless appealed to the City Hearing examiner within 14 days, which it was. Yet the City Attorney states:

They concluded that all of the conditions could be dropped except for the dedication of an eight foot right of way with a gravel path for pedestrians. *This final decision of the City was affirmed by the Hearing Examiner.*

City Brief p. 11 This is a lie. There was no administrative appeal of the March 7 letter. The administrative appeal was from the April 28 Letter Decision which denied the Church's request to waive the 30 foot exaction imposed for the sake of uniformity. That was the decision which the examiner affirmed. Further details are documented in the Church's Response to the City's Supplemental Brief such as the fact that both Director Huffman and attorney Capell testified under oath that but for the successful LUPA appeal *they would have enforced the 30 foot exaction against the Church.* RP 582

This deception seems obvious however it has dogged the Church throughout the course of this litigation despite repeated objections articulated time and time again by the Church. For example, the Court of Appeals opinion states the "Final Decision" of the City for the purpose of 64.40 is the Hearing Examiner Decision but never states what that decision is. Why not??

If you tell a lie big enough and keep repeating it, people will eventually come to believe it...It thus becomes vitally important for the State to use all of its powers to repress dissent, for the truth is the mortal enemy of the lie, and thus by extension, the truth is the greatest enemy of the State.<sup>1</sup>

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<sup>1</sup> Joseph Goebbels <https://www.jewishvirtuallibrary.org/joseph-goebbels-on-the-quot-big-lie-quot>

The Church agrees with the BIAW the City “knew or should have known” the final decision was unlawful. This statutory requirement must be applied objectively and the Court of Appeals’ opinion that a finding that some staffer “had performed a *Nollan/Dolan* analysis” is not germane to whether the City did or should know the law. BIAW brief p. 7, Decision at 494.

RESPECTFULLY SUBMITTED this 28th day of May 2019.

GOODSTEIN LAW GROUP PLLC

*s/Richard B. Sanders*

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Richard B. Sanders, WSBA #2813  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 28th day of May 2019, at Tacoma, Washington.

s/Deena Pinckney  
Deena Pinckney

# GOODSTEIN LAW GROUP PLLC

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